HUGHES TOOL COMPANY, ET AL., PETITIONERS,

v.

TRANS WORLD AIRLINES, INC.

No. [illegible]

HUGHES TOOL COMPANY, PETITIONER,

v.

TRANS WORLD AIRLINES, INC., ET AL.

[illegible]

[illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY, ET AL., PETITIONERS,

vs.

TRANS WORLD AIRLINES, INC.

No. 501

HUGHES TOOL COMPANY, PETITIONER,

vs.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 12308]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

Continued Deposition of Plaintiff Trans World Airlines, Inc., by A. V. Leslie—September 4, 1962

• • • • • • •

[fol. 12358] By Mr. Cook:

Q. Who became president of the airline after Mr. Frye resigned?

A. There was a period in which the airline was managed by an executive committee, of which I was chairman, and then at the 1947 annual meeting La Motte Cohu was elected president. La Motte Cohu had been a director of the company since 1936, 1935.

Q. What was the understanding expressed, generally accepted, if there was one, between Mr. Cohu and the TWA board as to whether his position was a temporary one or—

A. There was no understanding.

Q. Mr. Cohu is the same Mr. Cohu I believe you identified earlier as being on the TWA board as a nominee of Mr. Frye, or of TWA management?

A. He had been a nominee of the Frye regime. He in fact had been a director showing from the date of original incorporation of TWA under—

Q. Will you describe, Mr. Leslie, how Mr. Cohu was selected? Was there any committee, or who really selected him?

[fol. 12359] A. Perhaps I should say he made himself available. The question came up in the board meetings, lack of a president. La Motte indicated that he was available, he would like to become president.

Q. Did he indicate, Mr. Leslie, that he was doing this until a permanent president—

A. Not at all.

Q. Do you recall what the first equipment transaction was between TWA and Hughes Tool Company following that switch-over?

A. I believe that there were certain conditional sales contracts that were undertaken.

Q. TWA bought some aircraft from Lockheed that year, did they not? Let me see if I can refresh your recollection on that.

Look at Exhibit 130, Mr. Leslie—that is the CAB extract—on page 29. At the bottom of the page this exhibit recites that "as a part of Toolco's program of retrenchment, TWA, after acquiring four model 049 Constellations in March 1947, canceled its commitments for the model 649 equipment program."

Before we get into the Tool Company-TWA transactions, will you describe briefly what those acts were, if you remember, that is, the acquisition of the four? Were these [fol. 12360] bought from Lockheed?

A. My impression was that there was an undertaking existing at the end of 1946 to take up thirteen 049s, and in fact only four were purchased, and nine, or somewhere around that number, were canceled out of necessity.

I don't know that it says this here, but my impression is that, just that.

Q. So the first equipment acquisition by TWA after its switch-over of control was not from the Hughes Tool Company then, but from Lockheed, is that right?

A. I believe the next aircraft were acquired from Lockheed.

Q. Do you recall how those aircraft were paid for?

A. Through financing arranged by TWA with its banking group.

Q. Who was in your banking group at that time, Mr. Leslie?

A. The Mellon National, Bankers Trust Company, J. P. Morgan, Security First National Bank of Los Angeles, Bank of America, First National Bank of Boston, Hanover Bank, Continental Illinois of Chicago, and the Philadelphia National.

* * * * * * *

[fol. 12393] Q. I refer you to page 35 of Exhibit 130, the report of the CAB commissioner, and call your attention to the reference at the top of the page that in connection with a recent commitment by the carrier for twenty new Constellation aircraft, Toolco made the financing of this purchase by the banks possible by entering into a commitment with the banks that if as of December 31, 1949 the net worth of TWA had not been increased to $20,000,000, Toolco would undertake to provide the amount of the deficiency, and this commitment was made by Toolco without any profit to itself.

Does that refresh your recollection, Mr. Leslie, as to the twenty airplane acquisition?

Mr. Barr: Could I have that question repeated, please?

(The question was read)

[fol. 12394] A. I believe on the basis of this, I can say there were the twelve 749s, and then an additional contract for twenty 749-As was undertaken then in 1949.

Q. 749-A was a longer range version?

A. The development of the art. It had greater take-off and landing weight. It was just an improvement over the 749, basically.

Q. Do you happen to remember the Lockheed number of that purchase?

A. No.

Q. Were the aircraft bought from Lockheed?

A. They were, yes.

Q. They were not bought from the Tool Company?

A. No.

Q. Approximately when was that contract signed—when was the commitment made?

A. This was some time in 1949.

Q. Will you describe briefly the general size of that purchase, if you can recall?

A. The increase in the volume of the company's business required additional aircraft to be placed in service. That plus not alone the increase in the volume of the business, but the relegation and obsolescence of the DC-3, its replacement—replacement airplane.

[fol. 12395] I would say basically the increase in the volume of the airline's business, one could anticipate and see it required more airplanes be placed on order, granted it could find the credit.

We went ahead and worked up a credit with these banks, with our banking group.

Q. Who made the actual decision to make the purchase, Mr. Leslie?

A. TWA.

Q. Who was president of TWA then?

A. Ralph Damon.

Q. For the record, will you state who Mr. Damon was, and how he came to be president?

A. Ralph had been president of American Airlines for a number of years. With Cohu passing out of the picture, he resigned in mid-1948 to go with Convair as president of Convair, and we were without a president for some period there, and looking around for a president.

Certainly the directors of TWA took an interest in this, [illegible] I think most particularly did Dietrich. We found Ralph interested in the overtures that were made, and he came into the picture at the early part of the year.

Q. Mr. Leslie, who is Ralph Euler?

A. Ralph Euler was vice-president of the Union Trust [fol. 12396] Company, later the Mellon National Bank.

Q. He was the major TWA banker as of that time, then?

A. That's right, one could say they were the lead bank for TWA.

Q. What part, if any, did Mr. Euler play in the selection of Mr. Damon, if you can recall?

A. I believe he was a friend of Damon, and I believe that behind the scenes he may have had conversations with Ralph that were in a way inspired by TWA—acted as the honest broker, perhaps.

The Special Master: We will have a recess at this point.

(Whereupon, a recess was taken)

[fol. 12397] The Special Master: We will meet on the afternoon, at 2 o'clock, Thursday.

By Mr. Cook:

Q. I refer you again to the transaction by which TWA acquired 20 new Constellations which you felt were the 749As, and particularly to that reference made by the CAB examiner on page 35 of Exhibit 130, that Toolco made the financing of this purchase by the banks possible by entering into a commitment with the banks with respect to net worth.

Mr. Leslie, will you explain that statement. First, is that correct and do you agree with that statement, that Toolco's commitment made the purchase possible?

A. Yes.

Q. What was the state of TWA's finances at that time? Would it help to get an annual report?

A. No, it is just a matter of phrasing it. It was attempting to go beyond itself, if you like—its financial resources in the purchase of equipment, and the relationship of the debt to equity was so unfavorable, that it required a backup before the banks would move.

Q. I will come back to that in a moment, Mr. Leslie, when I can get the specifics from the annual report, but in the meanwhile may I ask you, Mr. Leslie, did you refer earlier to the purchase by TWA of some Martins in 1949?

[fol. 12398] A. No. I am thinking that we were talking about Martins at that time. Apparently this was not undertaken until sometime later, but I believe we were talking about the Martin airplane—a DC-3 replacement. The difficulty is what you were talking about, what you were negotiating, and when they were delivered—to get mixed up in three different areas of time.

* * * * * * *

[fol. 12432] Q. Mr. Leslie, prior to the time that the 749A purchase, that is, LD-60, was entered into, were other types of equipment considered by the management of TWA?

A. Yes, the field was reviewed, airplane types that were available were reviewed, which were essentially the Douglas airplane, the only other manufacturer at that time.

* * * * * * *

[fol. 12601] By Mr. Davis:

Q. Going back to Exhibit 153 before you, I refer you to page 3, and the paragraph on that page which reads:

"It is also apparent that for TWA to get a firm banking commitment for $42 million it would be necessary to sell at least $20 million of stock."

What was the basis for that statement in your memo, Mr. Leslie?

A. Well, the rationale, generally speaking, would be that —the rationale used at the time must have been that for every $2 of additional debt there would have to be an additional $1 of equity.

* * * * * * *

[fol. 12605] Q. The next sentence says:

"Also, it would require the funding of present debt to [fol. 12606] allow dividend payments to be made between now and 1956."

Would you explain what that means or meant?

A. I believe that the indenture contained a restriction on the payment of dividends until net worth was at a certain figure.

Q. You mean the restriction in the indenture with Equitable?

A. Yes.

Q. Your understanding was that that indenture prevented the payment or would have prevented the payment of dividends?

A. That's correct.

Q. Unless it was modified in some way?

A. That's correct.

Q. Even though it was contemplated that after taxes TWA would earn $6 million a year, that was your then understanding?

A. That was.

* * * * * * *

[fol. 12622]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

Continued Deposition of Plaintiff Trans World Airlines, Inc., by Robert Wiland Rummel—September 11, 1962

* * * * * * *

[fol. 12680] By Mr. Davis:

Q. I am not pursuing whether a particular manufacturer charges its customers the same price. I am still interested in the factors which influence the decision as to whether you elect to take equipment from one manufacturer rather than another, and my question was intended to find out, because I don't know the answer, find out whether or not there is apt to be such a difference in price between the product of one manufacturer over another that it is a major or controlling factor in your decision to procure equipment from one manufacturer rather than another.

A. Price, as well as the ability to negotiate price, is a consideration. Let's say has been a consideration, put it that way.

Q. I don't understand what you mean, ability to negotiate price. Aren't you always able to negotiate price? Maybe I don't understand what you mean by "negotiate."

A. You are always able to try.

Q. Have there been some instances when you felt or TWA felt that it was not in a position to negotiate price?

Mr. Williams: I think the witness has answered that they try to negotiate price. As I understand it, I gather you are asking are prices of comparable airplanes by different manufacturers the same, and the witness has answered that price is a factor, and the ability to negotiate [fol. 12681] price is a factor, which I think means that there is some leeway.

That is what I gather he meant by that. I don't know.

Mr. Davis: If we let the witness answer we will find out, Mr. Williams.

Mr. Williams: Yes, but the question you just put to him I don't think gives credit for the answer he gave originally.

The Special Master: In specific cases, have there been cases in which you have not been able to negotiate price, that is the question.

Mr. Davis: That's right.

A. This is an area, Mr. Davis, where in numbers of our contracts Mr. Hughes would personally participate, and in a number of cases I was able—I would work with him, to varying degrees, in this area, and I think, looking at it broadly, encompassing Mr. Hughes' activities as I knew them, as well as TWA, I don't recall any case where we didn't—weren't able to negotiate to some degree, at least, price.

It may have been limited to prices for changes, for example, it may not have been the base price. In other cases it might have been the base price. It depended on circumstances.

[fol. 12682] Q. You are talking about negotiating a price with the manufacturer of the aircraft?

A. Yes, sir. That is what I understood you to be inquiring into.

Q. That is what I mean. Your prior answer indicated that in connection with this price question your ability to negotiate the price was a factor which might influence your decision to acquire aircraft from one manufacturer rather than another, and if I understand your last answer, it is—what is your answer in that connection?

Mr. Williams: I don't think the witness needs to repeat the answer. He has already stated it.

Mr. Davis: No, he has stated that either with or without Mr. Hughes, so far as he is concerned, they were always able to negotiate price, at least in some areas.

I am trying to find out if there was any instance why the decision to acquire aircraft from one manufacturer rather than another was based upon the lack of ability to negotiate price with any particular manufacturer.

Mr. Williams: That is a different question. Go ahead.

A. May I point out that it has never been one of my [fol. 12683] functions to handle financing. I would work in the area of economics, the overall economics of the acquisition, but not the financing, and I think it is obvious there is a relation between price and ability to finance.

There were cases where we were unable to consummate deals because of inability to finance. I suppose one could say that if the airplanes were half price, which would be ridiculous, maybe we could have moved forward. I don't know.

Q. Let me put it this way: To what extent is there a competitive market available to an air carrier for equipment of a particular type?

A. Well, Mr. Davis, when we didn't have one we sought one, and frequently created one. We always found it desirable to have a competitive situation amongst the manufacturers.

Mr. Davis: May I have that last answer read to me, please?

The Special Master: Read the answer.

Mr. Barr: May the question be read too?

The Special Master: Read the question and the answer, please.

(The record was read)

Q. My question is, in connection with this competitive [fol. 12684] situation which you sought to have amongst these various manufacturers, did you find the prices quoted by these various manufacturers for the same or comparable flight equipment to be very close to one another, or was there apt to be a wide difference, or a difference to be a factor in the decisional process?

A. Generally out of the competitive situation came certain price concessions, or, in other cases, improvements that we desired in the airplanes.

We found that we usually were able, we thought, to obtain better airplanes through having a competitive situation than we otherwise would be able to obtain, and sometimes we felt we received price concessions.

The manufacturers would tend to outdo each other, and the hotter the negotiation usually the more prone they were to yield in some areas of contention between us.

Q. So that generally speaking, as a result of this trading with various manufacturers, a decision would be made to procure from one or another because of price concessions that you were able to obtain?

A. Price was one of the factors, Mr. Davis, that went into the decision hopper, so to speak.

Q. You also said that another major factor, if not a controlling one, was the desirability of adding the same type [fol. 12685] of equipment to an existing fleet, unless you were financially able to procure in numbers and amounts sufficient to create a new fleet—

A. I think I said in response to one of your questions that, as an example, on the selection of equipment, financial limitations could work this way.

Q. Apart from the financial limitation working that way, to what extent does the existence of a fleet of a particular type of aircraft dictate additions to the fleet rather than attempting to procure a new or different type of aircraft from another manufacturer?

A. It's just an item that has to be priced out.

Q. That has to be priced out, did you say?

A. Priced out, yes. If an airline has, say, a fleet of type A, the question is do you provide more As or go to Bs, for example?

Q. That is correct, that is my question.

A. All right. The extent to which the fleet A at hand affects the economics is the very extent to which you would consider the economics.

What I am trying to say is this: If you have type A, and get more identical airplanes, chances are the added provisioning investment, say per unit airplane, or per airplane unit, would be less than if you provide air- [fol. 12686] plane B.

Now, it isn't quite that simple. Airplane A and airplane B might be different airplanes, but they might have the same engines, or they might have much of the same equipment. This in turn could affect the degree of the economic impact, if you like, or the extent of economic impact, on selecting one versus the other.

Training might be less, of pilots, the rest of the cabin crew, by getting additional airplanes of the same type than if one goes to a different type.

These are items, as two examples, there are others, which we try to examine, and attach price tags to, and then take into account in making a recommendation.

Q. By provisioning you mean spare parts?

A. Provisioning is a term which applies to spare parts, broadly speaking, yes. This could include spare engines—in fact, the term is used different ways—it could include spare engines, rotable spares, insurance spares, pipeline spares.

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[fol. 12924]

RULING BY SPECIAL MASTER ON EFFECT OF DEPOSITIONS ON ADDITIONAL DEFENDANTS

The Special Master: * * *

I have tried to make it clear in these depositions that I expected these additional defendants and parties, whether they attended or not, to be bound by these depositions, and not feel free that they could have evidence adduced here and then come back at some later date and cover the same area at great expense to parties and all of the interested litigants, and therefore I have imposed upon them the responsibility of watching out for their clients' interests as to testimony that may be adduced as this case goes along, and also that rules which will be the law of the case during the continuance of the taking of discovery might well be established that would bind them in the future.

In light of that, even though it is a burden, it does, it seems to me, give them the full right to object from time to time, when they think there is a valid ground.

Mr. Davis: I understand what you are, in effect, indi-[fol. 12925] cating, Mr. Special Master, but may I clarify the position of the Tool Company in this matter?

The Special Master: Yes.

Mr. Davis: The additional defendants, as I understand it, have been invited to participate in these depositions, and have the normal rights to cross-examine, and the purpose and function of cross-examination is to clarify any part of any witness' testimony which they feel should be clarified in order to protect the interest of their clients.

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[fol. 13255] By Mr. Davis:

Q. Mr. Rummell, perhaps I can direct your attention to what I have in mind more effectively through this document.

May I have this marked as a defendants' exhibit? Those are handwritten notes of Mr. Thomas supplied to us by his counsel in response to a subpoena.

(Handwritten notes of Mr. Thomas marked Defendants' Exhibit 155 for identification, as of this date.)

Q. Are you familiar with Mr. Thomas' handwriting?

A. Not particularly.

Q. I am not going to ask you to authenticate this document. On page 2 of what has been marked as Defendants' Exhibit 155, the following appears:

"When Dillon, Read started to work on a permanent financing plan, Mr. Hughes sent word that 25 Boeing 707's and 20 Convair 880s would be made available to TWA, and the financing should be predicated on that basis. This reduction followed TWA's management's recommendation, and was perfectly acceptable."

My question to you Mr. Rummel, is are you familiar with TWA's management's recommendation to the effect that the Convair 880 program, so far as TWA was concerned, should be reduced from 30 to 20?

Mr. Barr: Could I have that question read?

[fol. 13256] (The question was read.)

Mr. Barr: I object to the form of the question.

The Special Master: Why?

Mr. Barr: Because "from 30 to 20 of the management decision" referred to reduction.

Mr. Davis: The witness testified his recommendation was 30, and was still his recommendation.

Mr. Barr: That is not the management decision referred to in that memorandum.

By Mr. Davis:

Q. For the reduction of the 880 program to 20 from whatever it was prior thereto.

The Special Master: Is there any objection in that form?

Mr. Barr: No, sir.

The Special Master: You may answer it.

A. The first recollection that I have, Mr. Davis, of No. 20 is hearing it from Leonard Schwartz in a phone call. As I recall it, Leonard was in New York, and I was in Kansas City.

Q. I am trying to refer you to the recommendation of TWA's management. I am asking you if you are familiar with the recommendation of TWA's management, either to [fol. 13257] Mr. Thomas or to Mr. Hughes or to anyone, to reduce the procurement of 880s downward to 20 aircraft.

A. I don't recall ever having participated in that kind of a recommendation.

Q. Let me then read to you the paragraph on that same page 2, of Defendants' Exhibit 155, which reads as follows:

"The commitments of the HTC for jet aircraft at this time was for 33 Boeing 707's, and 30 Convair 880s. I had stated several times that I thought the airlines had overbought on jets, and recommended that the HTC cut back on some of those orders if they could. This would make it possible to start jet operations with a good basic jet fleet, and then after a year or so operating record and appraisal of the market know what additional jet planes were needed and the type that best suited to keep TWA in the forefront of the industry."

Mr. Barr: Before you ask the question, Mr. Davis, I don't have this before me, but for the record could you state what the date these notes of Thomas bear?

Mr. Davis: Yes. They are dated March 1960, I believe. That is my information. It does not appear on the face of this particular exhibit, Mr. Barr, what the date of these handwritten notes were. My information is from the [fol. 13258] balance of the material furnished to us, and I believe to you and counsel for TWA by Mr. Thomas, that they were in March 1960. Page 7 of that exhibit refers to the morning of March 21st at 10:00 a.m. On page 4 there is a sentence which reads:

"The 2nd of December, 1959, and sufficient planes after January 1, 1960, to commence service in March 1960."

In other words, I think that you have to read the document itself and the events which were taking place to satisfy yourself that the date of these handwritten notes relate to a period in March 1960.

Mr. Barr: Thank you.

By Mr. Davis:

Q. My question to you, Mr. Rummel, is whether or not you are familiar with or ever heard of those views being expressed, either by Mr. Thomas or other senior officers at TWA?

A. Yes, I recall Mr. Thomas expressing the view at one time that if we obtained relatively few Boeings and Convairs, that in his view we would be in somewhat better shape, or maybe in a better position, if you like, to procure succeeding models that might be superior to those [fol. 13259] that were then being offered. However, this was long, long after the phone conversation I referred to a moment ago with Mr. Schwartz.

I recall, I think, that this took place with Thomas some time during 1960. I don't recall exactly when. I think at the same meeting he expressed the view that he personally thought the industry had overbought. I remember arguing with him some on that.

I believe Mr. Fellows was present at the meeting, and argued against that idea too.

I recall Thomas having commented pretty much as I understood you to read this, but this was quite late in the game, and long after the Schwartz conversation.

Q. Is that your full and complete recollection relating to that point of view? Did any other senior officers at TWA express comparable views?

A. I think Leslie did. I don't know that he expressed comparable views as to the reasons for his views, but I think he did express a view that 20 was enough.

Q. Do you recall views being expressed, either by Mr. Thomas or any other senior officer at TWA to the effect that it would be desirable not to over-commit TWA for a jet fleet until it could be ascertained useful and profitable, they could be operated, what improvements might be made, [fol. 13260] and subsequent models of jet aircraft, until after more experience had been gained as to their operation, or words to that effect—I mean thoughts to that effect?

A. I don't think any of us wanted to over-commit. It was a question of how we viewed over-commitment. For example, I recall Mr. Cocke taking quite the opposite views, as I recall it at least, he wanted 30, but I believe that both Mr. Thomas and Mr. Leslie did on occasion express the view that was stated.

Q. Do you recall the matter being seriously discussed at committee meetings or board meetings?

A. Not as to a decision process at all. As I say, I was advised that it would be 20.

Q. I understand that, but I am trying to get you to tell us what you know or heard of taking place within the TWA management, be it at board meetings or committee meetings, on the subject of whether it would be in the best interest of TWA to commit for thirty 880s, rather, than twenty, or some other number, or the desirability of waiting and getting some experience with jets before plunging all the way, so to speak.

A. It would not have been at board meetings. I do not recall any further such views being expressed by Thomas or other senior members of management.

[fol. 13261] This doesn't bear directly on it, but at one time Thomas suggested that we start looking at small jets. He thought that would be the next thing we should consider.

[fol. 13262] Q. Do you have any information, or have you heard it said to you by someone at Convair or TWA or from the Tool Company, or Mr. Holliday or Mr. Cook, that Convair insisted that the Tool Company if it was to cut back its order on the 880s from 30 to 20, to place an order for 990s?

A. I remember—I am just a little vague on the source—somewhere obtaining the impression that Convair was not willing to cut back its commitment for aircraft, but I am not clear at the moment as to the circumstances that lead me to believe that to be the case.

Q. You had never been told by anyone that Convair was insisting on 990 orders for the Tool Company before it would release the Tool Company from its obligation for thirty 880s? You never heard that in conversations with Convair or conversations with anyone? Is that your testimony?

A. I am trying to remember, Mr. Davis. I would understand your question to mean did I understand this from any reasonably reliable source at all. There is all sort of scuttlebutt on every subject in the industry. At the moment I don't recall, and I am sure I didn't participate in any discussions with Convair concerning cutting down an order from 30 airplanes.

Q. I understand that, Mr. Rummel, but that is not my question.

[fol. 13263] A. I do not recall, Mr. Davis. Nothing comes to mind, at least at the moment, concerning conversations with Convair, the willingness on their part, or even an approach to them, to substitute 990s for 880s.

Q. Is that your complete answer?

A. That is all I can do. If anything comes to mind, I will be sure to offer it. I just don't remember anything.

Q. Was that the kind of thing you would be likely to get if you ever knew it or if you had ever been told about it?

A. It's possible that I would be vague on it. I just don't know. I would not think so.

Q. I would like to read to you another paragraph from that same Exhibit 155, which appears on page 5. I am interested in the first sentence that I am about to read, so as to be sure that no one thinks I am trying to avoid putting anything into the record, I will read the entire paragraph, which is as follows:

"Mr. Rummel advised me on several occasions that the delays and postponements of the Convair are due entirely to Convair and not to Mr. Hughes. I have only in the last few days been informed that the two trainers could have been delivered in December but were held up on Mr. Hughes' personal instructions. That other of the planes [fol. 13264] have been ordered set aside by Mr. Hughes' representatives and put under guard so that no work can be done on them. If such is the case and allowed to continue, it will result in a large loss to TWA."

My question to you is, did you on several occasions advise Mr. Thomas that the delays or postponement of the Convairs were due entirely to Convair and not to Mr. Hughes?

A. In the period of the middle or late 1959, I can't be sure of the exact time, the Convair production line had begun filling up with 880s. Convair went into various part shortages, and had started to work on the airplanes, leaving certain components and parts off, and were beginning to get into trouble. At least it appeared they did not have a smooth-flowing production line.

At this time—I don't recall the exact time—I was concerned with the progress, and there were people to make contact with them to evaluate their progress. At this time one or two of our planes were pulled from the production line, and set aside.

At this time it was my understanding that it was Bill Bew's opinion, and I suppose he was reflecting not only his observation, but those of his group, but it was his opinion that while Convair would never probably acknowledge this, [fol. 13265] that by getting those airplanes off the line, it was cleaning the line up, so to speak, so that the rest of the line could move. In that respect it was not harmful.

As I understood it then, as I recall it now, I advised Thomas that the setting aside initially of those airplanes did not result in a delay, but that Convair was already delayed to some extent—that it might have the opposite effect.

Later on I had to change this because there was too much set aside and there was too much holding up.

I don't tie the dates in here, but I recall at one time having so advised Thomas. I did my best to keep him advised of things as they were as I saw them. I am not clear on the dates here about the airplanes being under guard, and that sort of thing. As I recall it, we kept him fairly well advised.

Q. You were keeping Mr. Thomas, the chief executive officer of TWA, pretty well advised as to what was taking place at Convair in connection with this 880 program?

A. I thought I was, yes. I made the effort.

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[fol. 13993] By Mr. Davis:

Q. I believe you testified about meetings where representatives of competing aircraft manufacturers were confronted, each signing a piece of paper as to their relative claims. I don't recall your having testified in any detail with respect to the meeting you are now referring to.

A. Well, I don't recall testifying in great detail. I recall having mentioned this.

Q. I didn't mean to interrupt you. I am interested in how that meeting came about, and—

A. It was called by Mr. Hughes.

Q. This was on the subject of the performance characteristics of the 1449A?

A. That's my recollection, yes.

Q. Please proceed.

A. Before all this got under way, that is, before the negotiation became advanced, we had analyzed the DC-7C and other airplanes that were being considered, I believe including turboprop possibilities of the Constellation, and had recommended that TWA procure the DC-7C. The DC-7C [fol. 13994] was a DC-7 with more wing and more fuel capacity. It may have had a fuselage one seat row longer than the DC-7, but I don't recall that at the moment. This recommendation had been concurred in by Mr. Damon and Mr. Collings, and I am quite sure had been passed along to Mr. Hughes.

It may have been this recommendation that sparked the negotiation at Lockheed, but I don't recall specifically that that in fact was the case.

But in any event, the Lockheed negotiation started about this time, or shortly thereafter, for the 1449A.

I recall on numbers of occasions advising Mr. Hughes that the 1449A, in my opinion, was uneconomical, and that it was a poor risk, that I didn't feel we had reasonable technical assurance that either the engine or the airplane, but my main worry was the engine, could be reasonably expected to produce the fuel consumption characteristics that Pratt & Whitney was claiming for it and that Lockheed was relying on.

At one point we looked at wing tip engines on the 1449A and found that with normal operating practices, as I recall it now, the airplane could only fly non-stop about halfway across the continent. That was with the tip engines on. [fol. 13995] I simply point that out to avoid confusion. We also, as I recall it now, looked at operating these tip engines part way across to get a speed boost and cutting them off and letting them fly along for the ride. We looked at all sorts of possibilities.

Mr. Hughes seemed determined to move forward with the 1449A. At one point I recall risking his anger by raising the question as to whether or not he wanted a vehicle with which TWA could make money. I realized there could be other considerations.

He indicated that he certainly did want airplanes that TWA could make money with, and that he recognized there was a difference of opinion between TWA and Lockheed on the merits of the airplane. I tried to dissuade him from moving forward with the 1449 because I did not believe it to be a worthwhile venture for TWA, and certainly not in comparison with the DC-7C.

[fol. 13996] There was an additional meeting, as I recall, at Lockheed attended by Mr. Damon; I think Mr. Collings, myself and Mr. Rourke. As I recall it, Bob Gross, Kelly Johnson, possibly Courtlandt Gross, Leonard Schwartz, and I think a few others, were there for Lockheed.

This was arranged before by Mr. Hughes in order for Lockheed to convince TWA that the airplane was a good airplane and one that they should be fully interested in, and possibly additionally to resolve some of the technical positions that we were apart on, but I don't remember that particular aspect being front and center at that time.

The 1649—I am sorry—the 1449A contract was signed by Hughes Tool—well, let me say, I didn't see anybody sign it, but it was wrapped up for signing. I guess I am not sure whether it was signed in California or Houston, but at least the signatures authorized on December 23, 1954, I think. I think it was December 23, 1954.

The meeting on December 23rd took place in the evening at the Beverly Hills Hotel. I recall that Raymond Cook, Mickey West, myself, I believe Harry L. West, were present, and I believe—well, I am certain the principal Lockheed representative was Leonard Schwartz, and I am sure there were a few others there.

[fol. 13997] I believe one was Kirk Yost, but I am not absolutely positive. We were in a largish green colored room downstairs.

It was some sort of a dining room. I forget what it was called.

Lockheed had the long paneled room on the other side of the building downstairs, and Schwartz was running from that meeting back and forth, conferring on various points with his people and then reporting them to Mr. Cook, who had the lead, as I observed it, in closing the deal.

I continued to try to prevail with respect to my views on the worthwhile nature of the airplane throughout the negotiation, and continued to do so that evening. As I recall it, at just about every opportunity and every free moment I tried to convince Mr. Cook, to some extent Mickey West—I say "some extent" because he was fairly new; I think that's the only time I saw him in relation to this particular deal—and I recall that at one point toward the end of the evening Mr. Cook was talking to Mr. Hughes, presumably either about the deal or the effect of the deal on the Hughes Tool cash position, or other considerations with which I was not directly involved or concerned, but Ray, knowing my [fol. 13998] long-standing feeling, urged Mr. Hughes talk to me, he had asked that I stand by, and after this was said several times through the course of the conversation, at the close of the conversation Mr. Hughes did talk to me, and I remember advising that I felt it was a poor bet—I don't recall my exact words—that it was an airplane which I felt was exceedingly risky and one which, from all that I could see, even at that stage, would simply be an uneconomical undertaking.

As I recall it, Mr. Hughes indicated that he felt that Lockheed would do a pretty good job, that he felt that Lockheed would do a better job than the papers indicated, and something to the effect that if they did not they would certainly lose a long-standing customer, or something to this effect.

I think he mentioned that he had an agreement with Lockheed—I don't recall what it was—either on the weight of the airplane, or some such thing, that he felt would improve the outlook.

I assume this was verbal. At least, I never saw it later, and it didn't come up again.

I did my best at that time to make it clear, at least as far as I was concerned, as a professional opinion, if you like, to

Mr. Hughes that this was not the way to go, either for TWA or himself. However, the papers were signed.

[fol. 13999] A good many other things went on during the period of the negotiation, and there were numbers of conversations with Mr. Hughes. I remember at one time being instrumental in having a couple of our pilots fly in one of the Navy airplanes equipped with these engines and to discuss with the Navy pilots who had flown it what their reactions were to the airplane.

When I say "the airplane," it was not the 1449, it was a standard size Connie with a standard wing with the same kind of engines mounted that I referred to earlier. Their reaction was exceedingly negative because of the—primarily, as I recall it, the vibration characteristics.

Several months after the deal had been closed—I am not sure of this now, but I think it was about several months, or thereabouts—I received a call from Kelly Johnson advising that while he hated to have to tell me this, Pratt & Whitney had withdrawn the engine from production because recent tests they had run indicated that it was hopelessly out of line with respect to fuel consumption and that they saw no way to improve the engine because of basic problems they had discovered, and that even half way improvements couldn't be made in time for the airplane program, and even if they were done, it still wouldn't be good enough, or words [fol. 14000] to this effect.

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[fol. 15094]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

Continued Deposition of Plaintiff Trans World Airlines, Inc., by A. V. Leslie—October 30, 1962

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[fol. 15098] Examination (Continued) By Mr. Davis:

Q. Mr. Leslie, I believe that the last time you were here we were discussing the financing of the Lockheed 1049.

Before resuming at that point, I would like to clear up some other points.

Let me first hand you what has been marked as Defendants' Exhibit 163 (handing to witness).

I believe that is an exhibit which was prepared since the time you were here. That exhibit, Mr. Leslie, is something which was prepared by counsel for the Tool Company based upon information available to us, and while we believe it to be accurate, I do not want you to assume that it is necessarily accurate. It was prepared primarily to assist persons testifying in this matter, to have something before them that might help to refresh their recollection.

At this point I would like you to look at Defendants' Exhibit 163, and advise me whether or not you are aware of any acquisition of aircraft by TWA up to 1950 other than those which are reflected on Defendants' Exhibit 163.

[fol. 15099] A. Certainly TWA acquired certain DC-4s which do not show here.

Q. Can you tell me approximately when that was, and the circumstances under which they were acquired?

A. I believe there were certain DC-4s that were acquired in the general area of 1945 to 1947, let's say.

Q. Do you know from whom they were acquired?

A. I believe they were certain ex-Army aircraft.

Q. Can you identify through whom or from whom they were acquired?

A. I believe they were purchased directly from the Air Force. There is a sheet, which would perhaps help me, that was amongst the very few pieces of paper that I passed you, which were the financing, the financing as distinguished from aircraft acquisition, since 1939, the piece of paper which I had, which might serve to help me.

Q. I want to get for you the paper or document you are referring to, Mr. Leslie.

Let me go off the record with you to see if you can identify it more clearly.

(Discussion off the record.)

Mr. Davis: May I have marked for identification a three-page document entitled "Chronological listing of financing arrangements from January 1, 1939 to June 30, 1961," as [fol. 15100] Defendants' Exhibit 205.

(Photostat of document headed "Chronological listing of financing arrangements from 1/1/39 to 6/30/61, consisting of three pages, marked Defendants' Exhibit 205 for identification, as of this date.)

By Mr. Davis:

Q. Mr. Leslie, is what has been marked as Defendants' Exhibit 205 the document you were referring to a moment ago?

A. Yes, it is.

Q. Can you identify what this document is?

A. It is a list of the financing—a list of the credits and security issues of TWA since the beginning of 1939, which I requested be developed for my information.

Q. Let me understand when that was prepared. It is something that you prepared or had prepared under your supervision?

A. While I was with TWA, yes.

Q. Can you tell me approximately when it was that you had it prepared, and who prepared it for you?

A. Sometime in 1961, I believe, and prepared by the assistant treasurer.

Q. This is one of the documents that you made available to us in response to the subpoena which we served on you?

A. That's correct.

[fol. 15101] Q. Have you had occasion before today to satisfy yourself as to the accuracy or substantial accuracy of what appears on this exhibit?

A. Yes, I have.

Q. And it is accurate, so far as you know?

A. I am quite sure that it is accurate, and I am quite knowledgeable and was concerned with all of the issues that are shown.

Q. Does this list all the financing arrangements entered into by TWA since January 1, 1939?

A. That is correct.

Q. To June 30, 1961?

A. That is correct.

Q. Whether or not it was in connection with the acquisition of aircraft?

A. All financing.

Q. I believe we were discussing the manner in which TWA acquired some DC-4s. With the assistance of Defendants' Exhibit 205, can you—

A. Well, I would have to say that the list of TWA aircraft acquisitions, 1939-1961, fails to show the purchase of certain DC-4s which the company in fact did purchase sometime during this period.

It is probable that there was no specific financing re- [fol. 15102] quired in connection with the purchase because of the low individual cost of the aircraft at the time, and these purchases would have been made shortly after the end of the war, and up to the latter part of 1946.

Q. Let me hand you what has been marked as Defendants' Exhibit 138, which is a prospectus of TWA dated February 18, 1949, and which has a section entitled "Equipment," and let me ask you if this refreshes your recollection or if you can identify more specifically the acquisition of

DC-4s by TWA during the period you are referring to (handing to witness).

You will find that beginning at page 20.

A. On page 21, I—there were DC-4s purchased from agencies of the U. S. Government, leased and purchased—so it states—and also three DC-4s were purchased from Taca.

Again, the amounts involved were undoubtedly quite small. Probably the airplanes were not more than $70,000 or $80,000 apiece. But they were acquisitions.

Q. Was the Hughes Tool Company or Mr. Hughes in any way involved in those acquisitions or the financing thereof?

A. I have no personal knowledge of whether he was or wasn't. I wasn't with TWA at the time of the acquisition: [fol. 15103] Q. Apart, then, from the acquisition by lease and purchase of the DC-4s which you have referred to, do you find any other omissions or inaccuracies in Defendants' Exhibit 163 for the period up to 1950 relating to the 1049s?

A. Well, this is unimportant. There would have been a Lockheed Electra purchased during this period, an executive airplane. That is, not the current Lockheed Electra, but a previous smaller aircraft called an Electra.

Q. Do you know when that was acquired?

A. It must have been sometime subsequent to the end of the war. It would, again, have been a small purchase.

Q. Do you know what happened to that aircraft?

A. It was sold.

Q. To whom, do you know?

A. I do not recall, but after the change in the Frye management the aircraft was sold.

Q. Was this an aircraft that was used by the executives of TWA?

A. An executive aircraft.

There is also one further aircraft that doesn't show up, which is a C-82, a type of aircraft known as a C-82, which was purchased as an engine carrier, and is now or was used abroad, based on Paris.

Q. This C-82 was used by TWA as a servicing aircraft?

[fol. 15104] A. As a servicing aircraft.

Q. Do you recall when or from whom it was acquired?

A. I believe it was acquired from the Air Force. It did not require any specific financing.

Q. Was the Hughes Tool Company or Hughes involved in any way with respect to these two aircraft you have identified, namely, this old Lockheed Electra and this C-82?

A. The Hughes Tool Company was—put it this way: The new Board of Directors which came into TWA in the early part of 1947 decided immediately to dispose of that airplane.

Q. Of the Lockheed Electra?

A. Yes.

Q. How about the C-82?

A. The C-82 was acquired later, and was, in fact, a servicing airplane purchased abroad, and used to transport engines within Europe from the Paris base.

Q. My question was whether or not the Hughes Tool Company or Mr. Hugh[illegible] was involved in any way in the acquisition of this C-82.

A. It was not—they were not.

Q. Referring to what has been marked as Defendants' Exhibit 205, and in order to make sure that we have adequately covered the ground to date, Mr. Leslie, can you [fol. 15105] identify or describe in a very general way this loan under date of April 11, 1939, the first item on Defendants' Exhibit 205?

Let me put it differently. Does it refer in any way to the financing of the acquisition of aircraft?

A. I believe that the borrowing of 4/11/39 was associated with the purchase of Boeing 307s, six Boeing 307s.

Q. Was the Hughes Tool Company or Mr. Hughes in any way involved in connection with that financing or acquisition that you have identified?

A. I don't know.

Q. Can you identify the Commercial National Bank?

A. Commercial National Bank was a smaller bank on Wall Street which was later acquired by the Bankers Trust Company or merged into the Bankers Trust Company.

Q. The next item, under date of April 30, 1940, refers to a common stock offering of 119,154 shares to Hughes Tool, and I note it relates to DC-3 equipment, in the amount of $1,659,000.

Can you identify or describe the transaction there involved?

A. I believe that that was associated with the purchase of the six Boeing 307s.

Q. What is this reference to DC-3 equipment?

[fol. 15106] A. That's neither here nor there. Perhaps partially associated with DC-3 equipment; but I believe primarily with the Boeing 307.,

Q. Can you describe to us what took place at that time?

A. Only there was a substantial purchase of equipment, or substantial for those days, which was a contract for six four-motored—the first four-motored airplanes in service on a commercial air carrier, and without remembering what the value per airplane was, it was fairly substantial, and I believe there was common stock required as an additional equity to allow the purchase of the equipment.

Q. Let me refer you to what has been identified as Defendants' Exhibit 128, which is an application to the New York Stock Exchange by TWA under date of March 29, 1940. Let me ask you if that item that you have referred to is the one covered by Defendants' Exhibit 128 (handing to witness).

A. My memory is better than I thought. Yes.

Q. This issuance of 119,000 shares in 1940 was not a public offering, was it, Mr. Leslie?

A. I don't recall.

Q. Do you have any knowledge of or familiarity with the transaction other than as it is described in what has [fol. 15107] been marked as Defendants' Exhibit 128?

In other words, do you know how this arrangement or deal was made between TWA and the Hughes Tool Company at the time?

A. I had some knowledge of it at the time, but it alludes me. There was an undertaking to purchase 307s, and the Hughes Tool Company purchased the stock.

Q. Do you know who the persons involved were who negotiated that arrangement?

A. I do not, other than having a general familiarity with the situation 22 years ago in the Union Trust Company, where I was concerned with certain of the activities of the Hughes Tool Company and TWA.

Q. Do you know whether or not, in connection with that purchase of stock by the Hughes Tool Company, there were any side agreements or understandings between TWA or anyone representing TWA on the one hand and Mr. Hughes or the Hughes Tool Company or anyone representing the Hughes Tool Company on the other hand?

A. I don't know of any.

Q. Can you tell us whether or not there was any agreement or understanding to the effect that the Tool Company would provide this financing on the condition that TWA acquire all of its aircraft from or through the Hughes [fol. 15108] Tool Company?

A. I don't know that this was involved. I have never understood that this was involved.

Q. Were you ever told that by anyone, that this financing by the Tool Company or its willingness or agreement to purchase this 119,154 shares of stock was on such a condition or any other condition?

A. It is my understanding that Jack Frye, TWA, were at that time a very forward looking carrier in the acquisition of equipment which was beyond the capabilities of the DC-3, and that they purchased these pressurized four-engine ships in the same manner that others later have purchased advanced equipment, and I had believed, I believe today, that it was a brainchild of Jack Frye's.

Q. I understand that, Mr. Leslie, and the other testimony that has been given with respect to TWA's plans, et cetera. The question I am now asking of you is whether you have any knowledge or information with respect to the contention which appears in paragraph 9 of the complaint, and for this purpose let me show you paragraph 9 of the complaint.

Let me hand you a copy of the complaint, and refer you to paragraph 9, which you will find on page 10 (handing to witness).

[fol. 15109] Without regard to the legal verbiage there, Mr. Leslie, if you look at 9 (b), you see the phrase there "only upon the condition that plaintiff acquire all such aircraft from defendant Toolco," and my question to you is whether you have any knowledge or have ever been told by anyone that the Tool Company or Mr. Hughes in effect said to TWA "I will provide you with this financing on the condition that you, TWA, agree that in the future you will acquire all of your aircraft from me, the Tool Company.".

A. I have never heard of such a statement.

Q. Do you know of anything which you have construed as being such a condition?

A. No.

Q. Will you go to the next item which appears on Defendants' Exhibit 205, which is under date of November 1, 1940, and which is entitled "Revolving credit agreement with Commercial National Bank and six other banks, 2¾ per cent due 12/31/44 prepaid on 10/31/42," in the amount of $2,250,000.

Can you tell us what that relates to?

A. I believe that that was a credit which was established for the purchase of DC-3 aircraft.

Q. That was a credit established by whom?

A. By TWA.

[fol. 15110] Q. Do you know whether or not Mr. Hughes or the Hughes Tool Company was involved in connection with this credit?

A. I don't believe there was any relationship to the Tool Company in connection with that.

Q. In other words, so far as you know, the Tool Company or Mr. Hughes was not directly or indirectly involved in negotiating the terms or participating in it or giving any guarantees or having any part in that—

A. I don't believe there was any guarantee on the part of Hughes Tool Company.

Q. I want to be sure that your answer is not limited to that of a guarantee. What I am trying to determine, Mr. Leslie—

A. I don't believe that the Hughes Tool Company had anything to do with the credit.

Q. Thank you. Now let's look at the next item, which is under date of August 1, 1945, which is entitled "Bank loan from group of banks secured by chattel mortgage on aircraft and equipment," in the amount of $1,700,000.

Can you tell us what that transaction was about?

A. I believe that was a bank loan incurred primarily to repurchase the Boeing 307s from the Air Force.

Q. Can you identify the group of banks involved there?

A. I believe it was the Commercial National Bank that [fol. 15111] headed the credit.

Q. Can you tell us to what extent, if any, either Mr. Hughes or the Hughes Tool Company was involved in this transaction?

A. I know of no involvement by the Hughes Tool Company in the credit.

Q. Now we come to the next item, under date of November 30, 1945, which is headed "Sinking fund debentures Series A, 3-3¼ per cent due 6/1/56," in the amount of $30 million.

What does that refer to?

A. This is a credit extended to TWA by the Equitable Life Assurance Society. It could generally be termed for the financing of post-war equipment by TWA.

Q. Is that the loan agreement entered into with the Equitable which originated the so-called three party agreement?

A. There was no three party agreement in the beginning of the credit, as far as I understand or know.

Q. I believe you previously testified with respect to that $30 million. I wanted to understand whether you have fully or adequately described the circumstances relating to the establishment of that arrangement with the Equitable.

[fol. 15112] A. I might preface my comment by saying that this credit was arranged prior to my being with TWA or the Hughes Tool Company, but my understanding is that—and was arranged by—the credit was arranged by the then management of TWA.

Q. The Frye management?

A. The Frye management. Specifically, Lee Talman and Frye. I do not believe there was any three party agreement which existed at the time of the issuance or the time of the undertaking of this credit.

Q. I am interested in what you know or understand the facts to be with respect to that arrangement. Was the

Hughes Tool Company or Mr. Hughes involved in establishing that arrangement with the Equitable?

A. I do not believe that the Hughes Tool Company had anything to do with the working up of this credit of 11/30/45 for $30 million.

Q. So far as you know, at the time it was established was there any agreement or understanding between anybody that you ever heard of that a condition to that financing arrangement was that TWA was to acquire all of its aircraft from or through the Hughes Tool Company?

A. I know of no such understanding.

Q. There is a reference, under date of May 10, 1946, to "Sinking-fund debentures Series B, 2¼-3¼ per cent [fol. 15113] due 12/1/55," in the amount of $10 million.

Can you tell us what that refers to?

[fol. 15114] A. I believe when the original issue of $30 million was entered into it was believed that this would be sufficient for the rehabilitation of the carrier, re-equipping of the carrier after the end of the war, but it was found that this sum failed to meet all of the requirements, and there was a further loan of $10 million extended by the Equitable.

Q. In other words, subsequently the Equitable advanced TWA an additional $10 million by acquiring these sinking fund debentures Series B?

A. That's right.

Q. Can you tell us who participated in that arrangement?

A. That again was the then Frye management.

Q. Was Mr. Hughes or the Hughes Tool Company involved in any way in that deal?

A. Not to my knowledge.

Q. I notice a line across the page at that point. What is the significance of that? Is that to separate the items appearing above that line from those appearing below the line?

A. That is to separate those which I had anything specifically to do with. Prior to that time I was knowledgeable, let us say, but really had nothing to do with. After that [fol. 15115] period—

Q. You were personally involved?

A. In one way or another, yes.

Q. Let's look at the next item, under date of 5/13/46, entitled "Equipment Mortgage Notes, 2 per cent due 10/8/51," in the amount of $1,238,663.

Will you tell us what that was about?

A. Perhaps I would have to change what I have said on two counts. Let us say that this line should have been down one line further, and then I think we go back to something else again, and that is, the 5/13/46 may well have been the repurchase of the Boeing 307s, and that the 8/1/45 related to the purchase of DC-3s and 4s.

Q. All right.

A. In other words, what I am saying is that the undertakings of which I have substantial knowledge in fact should relate to a period after 5/13/46.

Q. I understand that. I still want to ask you this question, if I may, Mr. Leslie, and that is whether or not you have any knowledge or belief of any kind as to whether the Hughes Tool Company or Mr. Hughes was involved in any way in connection with this financing of May 13, 1946—

Mr. Williams: I object to the question.

[fol. 15116] Q. (Continuing)—whether or not it relates to the acquisition or reacquisition of the Boeing 307s or the acquisition of DC-3s.

Mr. Williams: I object on the ground Mr. Davis has included the word "belief." I have not objected where he called for knowledge or information. This is the first time this morning he has said "knowledge or belief."

Q. When I used "belief," Mr. Leslie, I was referring to any knowledge that you may have, whether or not it is personal knowledge in the sense of your personal participation or it is knowledge based upon what you have been told by anybody.

The Special Master: Do you object in that form?

Mr. Williams: I don't object to that.

A. I do not know of Hughes being involved, the Hughes Tool Company, Hughes, being involved in any way in the financing as related to the mortgage notes of 5/13/46, or any of the issues prior to that time.

Q. I understand your answer, Mr. Leslie, but so that we have a clear record here, I want to be sure that you adequately understand what I mean when I ask you for whatever knowledge or information you may have. I always [fol. 15117] mean for you to tell me of anything which you have been told by anyone as a fact, whether or not you have personal opinions with respect to those facts. In other words, I am interested not only in anything in which you personally participated, but I am also interested in your disclosing or telling me anything that you were ever told by anybody, or ever saw in a writing, or have any information about, relating to whatever transaction I am inquiring about or participation by Mr. Hughes or the Hughes Tool Company I may be inquiring about. You understand me now?

A. I understand.

Mr. Davis: May we have our morning recess at this time?

The Special Master: We will take a short recess.

(Whereupon, a short recess was taken.)

Mr. Davis: May we proceed, sir?

The Special Master: Yes.

By Mr. Davis:

Q. Mr. Leslie, let's go to the next item which appears on Defendants' Exhibit 205, under date of January 31, 1947, which is entitled "Subordinated Convertible Notes, 2¾ per cent due 6/2/56," in the amount of $10 million. [fol. 15118] Can you identify that transaction?

A. Yes.

Q. Would you do so?

A. At the time of the change in the management of TWA, and the election of a new Board of Directors, an increased number of directors, the company was in very difficult financial straits, and I had observed, prior to this time, and prior to, in fact, December, that if the Hughes Tool Company were to—that I believed the injection of $10 million of new money would be sufficient to save the situation, that with these funds it could pay its bills, could manage to carry on until the cash gain part of the year, May, June, and the past investment could be saved, the past investment of the Hughes Tool Company could be saved.

The Hughes Tool Company chose to put these funds in, and at the time when there was not, in fact, sufficient funds available to it to pay the next payroll, and the $10 million, in fact, was sufficient to carry through until June.

I believe all the funds were drawn down by May, necessarily so, but the succeeding summer it turned out correctly, that there was a cash gain period, and from that time on the fortunes of the company improved. There were no [fol. 15119] other potential purchasers of any obligations on the part of TWA, of TWA securities, and that's the way it was.

Q. This $10 million was obtained by TWA by the sale to the Hughes Tool Company of $10 million principal amount of these subordinated convertible notes?

A. That's correct.

Q. And those convertible notes were convertible to common stock of TWA?

A. They were.

Q. I believe you previously identified that transaction and the conversion to some extent: We may cover it more fully later on.

At this point what I am interested in knowing is what was the purpose of the financing. You say at that time TWA was in poor financial condition?

A. The purpose of the financing was to save the company from bankruptcy.

Q. You made a reference that it was needed in order to meet payroll. You mean in the sense that it was cash immediately needed by TWA in order to pay its then current obligations?

A. I couldn't have stated it better. That's correct, yes.

[fol. 15120]. Q. It was not related, then, to the acquisition of equipment or aircraft at that time?

A. It was not related to the specific acquisition of aircraft, or to the acquisition of specific aircraft, no.

Q. Will you tell us whether or not TWA prepared any kind of projection relating to the need of this sum of money?

In other words, I would like to understand a little more clearly how this was negotiated and who took part in the development of this transaction.

A. Somewhere in the material which TWA has, the Hughes Tool Company has, there is a memorandum, which I prepared, which gave a notional view of the requirements of TWA for immediate funds and a projection of the possible results in 1947 if in fact $10 million were put into the company. This would have been a memorandum by me to Noah Dietrich.

Q. I do not have that memorandum readily available. I will see if I can locate it, and we will have you identify it if I do.

For my present purposes, can you, in a general way, give us your best recollection of what the essence of that analysis which you made at the time was?

[fol. 15121] A. In September of 1946, with the grounding of the Constellations during that summer, and the loss of revenue that resulted from it, it appeared that the company was in default on its obligations, the sinking fund debentures which we have just spoken of.

Q. Obligation to the Equitable?

A. To the Equitable. In October of that year, or November, the pilots went on strike for a short period, and this aggravated a situation which was then dedicated to expansion, and the company was forced to cancel out on certain equipment contracts with Lockheed, default on those, and despite this, at the end of the year, was—had insufficient cash to pay the payroll through the month of January.

It was at that time that the so-called change of management occurred, during that period, December. By that time, some time during December, November, December, we had tried desperately to find a way out of the financial problems that the company was facing by way of RFC loan or export-import bank credit, unsuccessfully, and we then came to the conclusion that—I came to the conclusion that a poor man's solution, $10 million, would serve to hold the thing afloat on the theory that we could in fact compromise these con- [fol. 15122] tracts with Lockheed, we could back up our bills if necessary with the fuel companies, and we would not have a drain exceeding $10 million if we went about a contraction of the company's employment and services, and that if we could get to June we would be home and free, and this is what was done.

Q. Can you identify the persons or individuals who were active in the negotiation of the terms, provisions, of this $10 million advance that the Tool Company made, terms, provisions or conditions?

A. I believe we had a situation in December of 1946 where it was reckoned by the Hughes Tool Company, the most substantial stockholder, that the then management would not be able to cure the problems which they themselves were responsible for, and that as a result there needed to be a change in that management, who took a more realistic view of the problems of the company.

As a result, the Frye group went out, there was a new Board of Directors came in, which were very substantially, in fact, completely nominees of the Hughes Tool Company. There was no president, there was a management—there was an Executive Committee, a Management Committee—I am not quite clear what the term was—which was comprised of directors of TWA, Noah Dietrich, Palmer Bradley and Leslie.

[fol. 15123] That committee negotiated the advance of these funds with the Hughes Tool Company, and the terms, and the rate, I believe the record would show, was the prime rate for money ruling at the time the notes were issued.

Q. That rate of 2¾ per cent was the then prevailing prime rate?

A. I believe so.

Q. In connection with this advance or financial support that the Tool Company gave to TWA was there any agreement or understanding expressed or implied that TWA thereafter was to acquire all of its aircraft only from or through the Hughes Tool Company?

A. There was no such consideration.

Q. Was there any agreement or understanding that you know of or have ever been told about, either expressed or implied, that thereafter all financing by TWA was to be done from or through the Hughes Tool Company?

Mr. Barr: Mr. Davis, would you specify for the record agreement between whom?

Mr. Davis: Any agreement or understanding between anybody that he has ever heard of, ever been told about, any knowledge or information he has as to its existence. There cannot be an agreement between people when there [fol. 15124] is no such agreement, Mr. Barr.

Mr. Barr: I assume that the question is whether there was such an agreement, and I assume that if there were such agreement there would be people.

Mr. Davis: If he has ever heard of any agreement between anybody, whether expressed or implied, whether the effect of it was, the intendment of it was, that TWA was to acquire aircraft only from the Tool Company or only through the Tool Company.

I want to know from this witness and from any other witness, from counsel for TWA, if they would like to tell me, whether any such agreement or understanding ever existed, and if so, between whom.

Mr. Williams: I am not being cross-examined, you understand, this is directed to the witness.

Mr. Davis: It is really directed to Mr. Barr, but it is directed to the witness also, and to such counsel of TWA who care to respond.

Mr. Barr: I am only trying, Mr. Davis, to understand the question. As I understand it now, your question is was there ever at any time any agreement between anybody with respect to this. Is that—

Mr. Davis: That is what I am trying to cover. At this [fol. 15125] point I am particularly addressing myself to the $10 million that was advanced by the Tool Company at a time when TWA was on the verge of bankruptcy, but my question to this witness can be broad at any time.

I don't care how it is answered, Mr. Barr, just so long as I get an answer.

Mr. Barr: I don't care how it is answered either, Mr. Davis. All I am concerned about is the question.

A. I know of no understanding—

Q. At any time?

A. (Continuing)—at any time, related to the purchase of equipment being required to be done through Hughes Tool Company or Hughes.

Q. Mr. Leslie, I would like you to address yourself to the next item, which appears under date of March 27, 1947.

which is entitled "Equipment Mortgage Notes, 2 per cent due May 27, 1952," in the amount of $2,815,480.

In connection with this and subsequent transactions it seems to me, Mr. Leslie, that it may be of some help to you if I were to make available to you what has been marked as Defendants' Exhibit 138, which is a prospectus of TWA under date of February 18, 1949, merely because it contains [fol. 15126] a description of equipment acquisitions with respect to prior years, and also has some statements of fact under the heading "Relations With Hughes Tool Company," and it also has some information under the heading "Relations With The Holder Of Debentures."

This prospectus, 138, may assist you in your answer. Let me hand you what has been marked as Defendants' Exhibit 138 (handing to witness). If you refer to it, you will find reference to equipment starting at page 20, the relations with Hughes Tool Company begins at page 22, and relations with the holder of debentures begins at page 24.

What I want, of course, is your knowledge of the facts.

Mr. Barr: Mr. Special Master, I have no objection, in order to expedite this examination, to having the witness refer to this, review it, but I would request, after he has done so, that the questions be directed so that he may specify what is his recollection, and the extent to which his recollection has been refreshed by reading this document.

Mr. Davis: I wanted his knowledge of the facts, and my question relates to this equipment mortgage note of $2,815,480.

Q. Will you please tell us what you know about that trans- [fol. 15127] action, Mr. Leslie? You may, if you want to, tell us to what extent anything that you see refreshes your recollection. I am more interested in your answer than how your recollection is refreshed.

Mr. Barr: I think we are entitled to be interested in what the witness knows and what the witness sees in that document that refreshes his recollection.

The Special Master: I think that is a proper inquiry.

Mr. Leslie, after you give your answer, will you kindly tell how the exhibits refresh your memory, and how much you recall independently?

The Witness: Sure.

A. In the latter part of 1946, 1946, there was a cancellation of certain of the orders from Lockheed for certain 049 aircraft, and Lockheed were left without a purchaser for these aircraft, and TWA was—failed to have them, the aircraft.

During the winter of 1947 we negotiated with Lockheed a contract for certain of those previously cancelled airplanes, and these four ships, which are four 049s, were financed substantially 100 per cent through these equipment mortgage notes running to Lockheed. That is what it was. [fol. 15128] The refreshing of my memory on this is very little. I remember the transaction without the prod to my memory.

Q. Let me refer you now to what has been marked as Defendants' Exhibit 182, which is the minutes of the meeting of the Board of Directors of TWA of February 25, 1947, and which has certain minutes under the heading "Lockheed Negotiations," and which opens up by stating "Mr. Leslie advised the meeting of discussions in progress with Lockheed Aircraft pointing out that," and then follows a statement attributed to you, Mr. Leslie.

Would you read that over carefully, please?

A. I have read it.

Q. First let me ask you, does that correctly and fairly reflect the report that you in fact made to the directors at that meeting?

A. It does.

Q. Are the facts thereby reflected the correct facts so far as you know?

A. Yes, they are.

Q. Let me particularly call your attention to the last paragraph that appears on page 6 of that exhibit, which reads:

> "It was further pointed out that the issuance of [fol. 15129] notes would require clearance and consent with respect to the arrangements under which the sinking fund debentures of this corporation had been issued,"

Will you explain what that means or refers to?

A. I believe that the so-called Equitable indenture required—prevented borrowing, further borrowings, without the approval or waiver of the holders of the debt, the Equitable.

Q. In other words, this transaction with Lockheed relating to these Model 49 aircraft required the consent and approval of the Equitable?

A. I believe so, yes.

Q. Was it in fact obtained?

A. It was.

Q. Do you recall what took place in connection with that aspect of the transaction?

A. I do not. We gained the consent.

Q. To whom were these equipment mortgage notes issued or delivered?

A. Lockheed.

Q. What part, if any, did the Hughes Tool Company or Mr. Hughes have in this transaction?

A. Nothing at all.

Q. It is not quite clear to me, Mr. Leslie, why the consent [fol. 15130] of the Equitable was required for the acquisition of additional aircraft if such acquisition was financed with a purchase money mortgage, in effect.

Mr. Barr: I object to the form of the question.

The witness has not testified that the Equitable's consent was required to purchase new aircraft. I don't recall that this witness has testified to anything about a purchase money mortgage. I think that question misstates his testimony in those two particulars.

The witness has testified that under the Equitable indenture consent was required to any more loans being made by TWA.

The Special Master: You consider this was not a purchase money mortgage, in effect?

Mr. Barr: I don't know what it was.

The Special Master: I thought that was the description that the witness gave to it, the obligation was issued to Lockheed in payment for the airplanes.

Mr. Barr: That is what he said. I don't know that it is characterized as an equipment money mortgage.

[fol. 15131] Mr. Davis: Let us see if we can get what the facts are, Mr. Barr. Maybe you don't understand what an equipment money mortgage, in substance, is.

Q. Can you clarify Mr. Barr's difficulties, Mr. Leslie?

Mr. Barr: I object to the form of that question.
The Special Master: Sustained.

Q. Will you describe the nature of these equipment mortgage notes, Mr. Leslie?
A. They were mortgage notes secured by four 049 aircraft.
Q. Am I correct in understanding that TWA was purchasing from Lockheed some 049 aircraft—is that correct?
A. That is correct.
Q. How were they paid for?
A. Through the issuance of mortgage notes.
Q. And cash; or was it paid for entirely by the equipment mortgage notes?
A. I believe the cash was a nominal amount.
Q. So that TWA acquired additional aircraft by paying a relatively nominal amount of cash to Lockheed and giving Lockheed $2,815,480 of equipment mortgage notes at the rate of 2 per cent, maturing on May 27, 1952, is that [fol. 15132] correct?
A. Correct.
[fol. 15133] Q. These equipment mortgage notes were a mortgage on what or a lien on what?
A. Four 049 aircraft.
Q. Only on those four aircraft?
A. There probably were some spares as well with that.
Q. Aircraft and related spares?
A. That's right.
Q. In order to carry out that transaction it was necessary to obtain the consent of the Equitable, is that correct?
A. This is my understanding at this distance, yes.

Mr. Davis: Mr. Special Master, if that doesn't describe the substance of a purchase money mortgage, I don't know what a purchase money mortgage is.

The Special Master: There may, Mr. Davis, be a right over against the corporation that is involved.

By Mr. Davis:

Q. Can you tell us, Mr. Leslie, what the rights of Lockheed were against TWA for payment of those aircraft, other than the lien it had acquired on those aircraft?

A. I believe it had a call on the general credit of TWA in the event of any deficiency.

Mr. Davis: At this point, Mr. Special Master, I would [fol. 15134] like to substitute photocopies of the minutes themselves as Defendants' Exhibit 182 so that we can have a record of the directors present and those absent at the meeting.

The Special Master: Is there any objection?

Did you hear the question?

Mr. Barr: I think I heard it.

Off the record.

(Discussion off the record)

The Special Master: The substitution may be made at this time.

(Photostat of minutes of the adjourned Board of Directors meeting, Transcontinental and Western, Inc., February 25, 1947, marked Defendants' Exhibit 182 for identification as of this date)

By Mr. Davis:

Q. Mr. Leslie, will you now turn to the next item on Defendants' Exhibit 205, under date of March 25, 1948, entitled "Equipment Mortgage Notes, 3 per cent due 5/31/53," in the amount of $17,945,423, and explain what transaction was there involved?

A. I believe this related to the financing of 749A aircraft.

Q. To whom were those notes issued?

[fol. 15135] A. I believe to a banking group, a group of banks.

Q. Can you describe or explain how these 749A aircraft were financed?

A. With the equipment mortgage notes of $17,945,000.

Q. What is not clear to me is just what took place, Mr. Leslie. Did that reflect the entire purchase price of the aircraft and related equipment, was it merely a part of it?

A. I believe that this block of aircraft were financed to the extent of somewhere between 60 and 65 per cent by a credit extended by a group of banks and the balance from company funds.

Q. In other words, Lockheed received cash for the aircraft it sold?

A. That's right.

Q. And TWA obtained that cash in part from its own resources and the balance by going to a group of banks?

A. Right.

Q. And the group of banks, in effect, purchased or received these equipment mortgage notes which are there referred to in Defendants' Exhibit 205, is that correct?

A. That's my memory.

Q. Can you identify this group of banks?

A. The Mellon Bank of Pittsburgh, Bankers Trust Com-[fol. 15136] pany, J. P. Morgan, First National Bank of Boston, Bank of America, Security First of Los Angeles, California Bank, Los Angeles, very possibly one or two other banks.

It may be that the Hanover Bank was in this financing and the Philadelphia National.

Q. Was the Hughes Tool Company or Mr. Hughes involved in that transaction?

A. This was a credit negotiated between and by TWA and its banking group.

Q. I want to go back to the events relating to the acquisition of the 749As. Referring to Exhibit 163, you are referring to what is described there as the acquisition of twenty-five Lockheed 749As under a contract with Lockheed dated May 31, 1949, or are you referring—

A. Yes.

Q. That is what you are referring to?

A. That's right.

Q. Before pursuing what transpired in connection with that acquisition, Mr. Leslie, let me clarify what took place subsequent to March 1947 with respect to the efforts of TWA to acquire additional aircraft.

Let me refer you first to what has been marked as Defendants' Exhibit 184 (handing to witness), which are minutes of the meeting of the Board of TWA of September [fol. 15137] 30, 1947. You see what appears in the minutes under the heading "Acquisition of New Aircraft." Would you read that carefully?

Mr. Davis: At this point, Mr. Special Master, I would like to substitute copies of the minutes themselves for what has been previously marked as Defendants' Exhibit 184.

The Special Master: Is there any objection?

Mr. Williams: I have no objection.

The Special Master: The substitution may be made.

(Photostat of minutes of the Board of Directors meeting, Transcontinental and Western Air, Inc., September 30, 1947, marked Defendants' Exhibit 184 for identification as of this date)

A. I have read this.

Q. You see you were a director present at that meeting, were you not, Mr. Leslie?

A. I was.

Q. Do you recall what the president of TWA at that time presented to the meeting with respect to the need of TWA for additional new aircraft?

A. I do by reference to the minutes of September 30, 1947.

Q. You have no independent recollection of what took [fol. 15138] place at that meeting other than what appears in the minutes?

A. Well, I believe we were negotiating at that time for 749A—749 aircraft, and ultimately purchased them.

Q. I understand that. What I am inquiring at the moment, however, is whether or not you have a present recollection, however it may be refreshed by looking at the minutes, of what transpired at that meeting with respect to the subject matter which appears in these minutes under the heading "Acquisition of New Aircraft."

A. I believe this was only a report of negotiations with Lockheed by Mr. Cohu. There was no action involved really at that time. They approved the president's continuing to negotiate with Lockheed for those aircraft.

Q. You notice the sentence which reads:

> "It was the unanimous opinion of the directors that it was desirable for the corporation to secure additional four engine equipment at the earliest possible date."

The question is do you have any recollection as to what views were expressed at that meeting with respect to the need of TWA to secure additional four engine equipment at the earliest possible date.

A. Will you please ask that—

[fol. 15139] The Special Master: Read the question.

(The question was read)

A. I believe the policy making officers of TWA all felt that there was an inadequate fleet for the traffic which was in early prospect, and this view was stated to the Board, and agreed upon, agreed to by the Board.

Q. Do you have any knowledge or information of the extent to which, if any, Mr. Hughes or the Hughes Tool Company or any of their representatives took any position or stated any position with respect to this equipment need of TWA?

Do you understand my question?

Mr. Barr: May he read the question?
The Special Master: Yes.

(The question was read)

Mr. Barr: I would like to ask for clarification, Mr. Davis. Do you include in that those members of the TWA Board who were representatives of the Hughes Tool Company?

Mr. Davis: No, at the moment I am inquiring whether the Board, any officer of TWA, was told what the views or positions of the Tool Company or Mr. Hughes were. [fol. 15140] I am not inquiring into how the directors acted at the Board meeting. The minutes reflect that. I do intend to find out whether or not they fairly or correctly reflect the facts.

At the moment I am inquiring what knowledge he has, if any, with respect to any messages, directions, instructions, positions taken by the Hughes Tool Company or Mr.

Hughes or any of the recognized representatives with TWA, its management, including its directors.

In other words, did they receive any instructions, messages, suggestions, directions.

Mr. Barr: As long as you include representatives, I comprehend that your question does include the representatives of the Tool Company who were on the Board of TWA at that time.

Mr. Davis: No, sir, you do not understand me correctly. We understand who the directors of TWA were, and so far as the record is concerned, and so far as I am concerned, those directors were acting as directors of TWA.

You may try to prove otherwise if you care to. I am referring now to a person acting as a representative.

It may be the same person who was a member of the [fol. 15141] Board, and I am not excluding any such person. So Mr. Leslie may understand me, any person who was on that Board who considered himself to be a representative or agent of the Tool Company for the purpose of carrying on messages or instructions from the Tool Company, I am covering that.

Mr. Barr: I am still confused, but maybe the witness isn't.

Mr. Davis: The witness may answer the question however the facts are.

A. I know of no direction by the Hughes Tool Company or by Hughes to purchase or not purchase these aircraft. The needs for aircraft were developed by TWA itself, and the negotiations under the contract were between Lockheed and TWA, and Cohu, as president, was one of the negotiators, as was I.

Q. With Lockheed?

A. With Lockheed.

Q. So far as you now know or have any knowledge or information, Mr. Leslie, do these minutes correctly reflect what took place at that time?

A. I believe they do.

Q. There is a reference in the next sentence as to the possibility of leasing or purchasing Army DC-4s as they [fol. 15142] are released by the other airlines, and that sentence ends:

> "But it was the sense of the meeting that due to the uncertainty of delivery dates and the capital requirements needed for securing such equipment the Lockheed proposal outlined by the president appeared to be the most likely way of obtaining in time equipment of a competitive nature with a minimum outlay of operating capital and for a price and on terms advantageous to the company."

Would you explain to us a little more fully what that portion of the minutes refers to, and explain what it means by referring to the uncertainty of delivery dates and capital requirements needed for securing such equipment?

A. I believe that—I find myself confused, I must say, here. There is either an omission of a credit in this list—I suspect there is an error in this list, or an omission in this list, and this—

Q. By "this list"—

A. This is the chronological listing of financing arrangements, 205. I find myself confused here. There may well have been an intermediate credit which was wiped out by some other transaction that bundled up something which had taken place in the past and tucked two credits together, let's say.

[fol. 15143] I believe this credit—I believe I was talking about the $17,945,000 and twenty-five Lockheed 749As, and then you reverted to the 749s on 11/18/47.

The financing for that does not show up on this list. Nevertheless, there was financing, and I believe it was, say, the standard banking group, including, I believe, Curtis Wright.

Q: You are now referring to the financing arrangement with respect to twelve Lockheed 749s?

A. That's right, LD-42.

Q. Which is referred to in Exhibit 163 as contract No. LD-42?

A. That's right.

Q. Go ahead and explain to us what happened at that time.

A. Well, I am being asked here to keep in extreme detail in my mind occurrences of, make it, fifteen years ago, and

subject to the record, which will show, I can only say that this credit was made by the banking—the so-called TWA banking group, which happened to be the identical banks that were the Lockheed banking group, also including, I believe, Curtis Wright, which owned the engines, becoming a banker for the engines, and Lockheed guaranteeing the obligation insofar as the airframes were concerned.
[fol. 15144] It was a—I was going to say a tri-partite arrangement, but it was even more than that. The terms were quite favorable, as I recall it, to TWA, in Lockheed's effort to sell the planes, our desire to purchase, their eagerness to sell, but you know and I know that somewhere in these minutes—we can clarify all of this. The minutes of the Board meetings, where the authorizations for the financing were approved—

Q. I can show you some subsequent minutes which refer to that.

A. It would be something subsequent to 9/30/47.

Q. I appreciate that, Mr. Leslie. What I was asking you was to describe a little more fully what appears to have been the consideration given on September 30, 1947 between leasing or purchasing some Army DC-4s and the purchasing of later equipment yet to be manufactured and this proposal by Lockheed, and at this point I am more interested in the decisional process which took place before we get to the description of the actual financing which eventuated in connection with the deal that was made with Lockheed, and which is more fully described in the minutes of a subsequent meeting.

A. It would have been put at that meeting that the only alternative to the purchase of the 749 would have been, [fol. 15145] in fact, obsolete C-54s, which were not of the same order of service capability as these ships.

They were not recommended, that they go forward with this, but whether the minutes say this or not, there would have been said, because it was true, that they were a very poor alternative.

The C-54 did not have the capabilities of the 749 airplane.

Q. Let me refer you, then, to what has been marked as Defendants' Exhibit 185.

Mr. Davis: At this point, Mr. Special Master, may I substitute copies of the minutes themselves for what has been previously marked as Defendants' Exhibit 185.

The Special Master: If there is no objection, you may.

Mr. Williams: No objection.

Mr. Davis: These being the minutes of the Board meeting of TWA held on October 30, 1947.

(Photostat of minutes of the Board of Directors meeting, Transcontinental and Western Air, Inc., October 30, 1947, marked Defendants' Exhibit 185 for identification as of this date.)

Q. Let me hand you what has been marked as Defendants' Exhibit 185, Mr. Leslie, and let me direct your at- [fol. 15146] tention to the minutes which appear under the heading "Acquisition of New Aircraft." I ask that you read that carefully. Let me know when you have done so.

A. I have read it.

Q. You were present at that Board meeting, as reflected by the minutes, were you not?

A. I was.

Q. First let me ask you, do those minutes correctly reflect what took place at that Board meeting?

A. They do.

Q. Will you continue with your description of what was transpiring at that time insofar as TWA was concerned with respect to the opportunities to acquire other aircraft or the decision of TWA to acquire additional aircraft?

A. Well, these minutes would reflect the continuance of negotiations with Lockheed for the purchase of the 749s and the conclusion that the DC-4s were not a reasonable acquisition as compared to the 749s.

Q. I note that the president advised the meeting that further negotiations with Lockheed for the purchase of twelve 749s previously authorized by the Board had been delayed in order that the possibility of purchasing seven 49s and six DC-4s from American Overseas Airlines and fifteen DC-4s from American Airlines might be investigated.

[fol. 15147] Do you recall whether or not that in fact took place, and if so, can you describe—

A. Oh, I believe that it took place, but underneath it all was the fact that the DC-4s were not as—were not truly competitive aircraft, and that the AOA deal was somewhat chancy.

Q. You see the minutes reflect that the president also reported:

> "That in discussions with banks it had been determined that the twelve Model 749 Constellations could be financed on terms outlined at the September 30, 1947, Board meeting while the financing of seven Model 49s and fifteen DC-4s was still an open question, and therefore recommended that negotiations for the purchase of the twelve 749 Constellations from Lockheed be aggressively continued."

I am trying to find out, Mr. Leslie, or I am trying to elicit from you your knowledge and information you may have with respect to those discussions with the banks, and why it was that it had been determined that the twelve Model 749s could be financed while the older or the prior Model 49 Constellations and the DC-4s were still an open question.

In other words, I am trying to get you to tell us what was [fol. 15148] happening at that time, and in so doing, I would appreciate it if you would identify the persons involved in those discussions or negotiations or whatever took place.

A. I think it is a fair statement that the DC-4s and the 049 aircraft were not at that time considered as up to date or as competitive as the 749s, and the banks were not agreeable to the financing of aircraft which were obsolete, but were willing to finance aircraft which were completely competitive.

Q. Do you recall those discussions with the banks, when they took place, who was involved, at least in a general way?

A. I don't believe there were very many discussions. The banks came very easily to the view that they did not wish to finance the older aircraft of American into TWA service.

Q. Did this financing, proposed financing, also require the consent or approval of the Equitable?

A. It would have.

Q. Can you tell us whether or not such acquiescence or approval was obtained before or during these discussions with the banks or after the discussions with the banks? Can you tell us how that took place?

Mr. Barr: Consent or approval to what?

[fol. 15149] Mr. Davis: Read what is on the record to Mr. Barr, please.

Mr. Barr: I heard the question. It is not necessary.

You mean as a general practice, or—

Mr. Davis: With respect to the financing of these twelve.

A. No, I believe the condition of the debentures required an approval or waiver for the incurring of the debt necessary in connection with the purchase of these aircraft, and that it was obtained from Equitable, although I believe at the price of some concessions on the part of the Hughes Tool Company.

Q. That is what I want you to tell us about.

A. I believe it was this time when the three-party agreement came into effect. That may be wrong.

Mr. Davis: This would be a convenient point for the luncheon recess, Mr. Rankin.

The Special Master: We will recess until 2:00 o'clock.

(Whereupon, at 12:45 p.m., a luncheon recess was taken.)

[fol. 15150]

Afternoon Session

2:00 P.M.

A. V. Leslie, resumed the stand and testified further as follows:

Examination (Cont'd).

By Mr. Davis:

Q. Mr. Leslie, just before the luncheon recess you were trying to recall the circumstances involving the financial arrangements which were made in connection with the acquisition of twelve Lockheed 749s, and you were questioning in your mind the accuracy of what had been listed on Defendants' Exhibit 205.

In that connection, you made a reference to the possibility that something led to the so-called three party agreement which heretofore I had understood was something which occurred in connection with the conversion of the $10 million note that the Tool Company had acquired from TWA on January 31, 1947.

However, to refresh your recollection, let me show you what has been marked as Defendants' Exhibit 132, which is entitled "Three-party agreement," solely for the purpose, at this time, to orient you timewise as to when that transaction took place, and then I will return to the financing of those twelve 749s.

Mr. Barr: Off the record.

[fol. 15151] (Discussion off the record.)

Q. Have you looked at what has been marked as Defendants' Exhibit 132, entitled "Three-party agreement"?

A. I have.

Q. Does that refresh your recollection as to the circumstances under which that agreement was entered into?

A. Yes, it does.

Q. Can you tell us what transaction that agreement relates to?

A. Well, it relates to the issuance of the $10 million of sinking fund debentures.

Q. In other words, that is an agreement that was entered into in connection with the $10 million advanced by the Tool Company in January 1947 which you previously identified or described as the subordinated convertible notes, is that correct?

A. That is correct.

Q. Beg your pardon?

A. That is correct.

Q. Does that refresh your recollection so that you want to add to your prior testimony with respect to what transpired in connection with the $10 million advanced by the Tool Company to TWA in January of 1947?

Mr. Barr: Again, Mr. Special Master, I would like to ask [fol. 15152] that the witness specify what he recalls and what comes as a result of reading that document.

The Special Master: Yes. Do that, Mr. Leslie, please.

The Witness: Would you ask that question again? I was intent on reading this.

The Special Master: Say what you recall yourself without referring to the document, and then how you are refreshed.

The Witness: Yes.

A. Well, the three party agreement was required by the Equitable as a condition of Hughes advancing the $10 million of funds, and it provided that in the case of a default on the Equitable debentures there would be a voting trust established.

Q. In other words, the consent of the Equitable was necessary before TWA could incur or could borrow this $10 million from the Hughes Tool Company?

A. Correct.

Q. And such consent was obtained from the Equitable at that time?

A. That's right. There was a three party agreement entered into.

[fol. 15153] Q. What has been marked as Defendants' Exhibit 132, entitled "Three-party agreement," reflects the consent of the Equitable with respect to the borrowing by TWA of $10 million from the Hughes Tool Company in January 1947?

Mr. Barr: I object to the form of the question. The document is what it is. I object to the witness characterizing it.

Mr. Davis: How does my question read?

(The question was read.)

Mr. Davis: If you question that, Mr. Barr, let me ask you, Mr. Leslie, the consent you testified was obtained from the Equitable, is it reflected in any document that you know of?

The Witness: It is reflected in the three party agreement.

Q. I want you to address yourself to the events which occurred in connection with the financing arrangements which were made by TWA with respect to the acquisition of these twelve Lockheed 749s. The last thing we referred to was the minutes of the Board meeting of October 30, 1947, which have been marked as Defendants' Exhibit 185.

Do you have that before you?

A. Yes, I do.

Q. You were describing the meetings or conversations [fol. 15154] with the bankers relative to financing available for the acquisition of these twelve 749s versus the possible acquisition of some 049s and DC-4s, and as I recall, you described that.

Have you now given us your complete recollection as to what took place in that connection?

A. No, I have not. I fail to find on the chronological listing of financing arrangements, i.e., Exhibit 205, the financing that was done in connection with that purchase.

Now, you have shown the minutes of the Board meeting of 10/30/47, but there must be—has to be the minutes of subsequent meetings that will bring back my memory on what occurred. I know we purchased the aircraft, I know there was financing, but I don't find it on this list. So there we are, that is where I am at the moment.

Q. All right, Mr. Leslie. At the moment I was merely trying to get you to describe what was taking place with the bankers as reflected in the minutes of the meeting of October 30, 1947.

But so that you may orient yourself in your recollection of events, let me now refer you to the minutes of the meeting of the Board dated December 9, 1947, excerpts from which have previously been marked as Defendants' Exhibit [fol. 15155] 186, and at the same time let me also refer you to what has been marked as Defendants' Exhibit 187, which are the minutes of the Board meeting of TWA of February 27, 1948.

Mr. Davis: At this time, Mr. Special Master, may I have the minutes of December 9, 1947 marked as Defendants' Exhibit 186 in lieu of what previously had been marked as Defendants' Exhibit 186, and the minutes of February 27,

1948 marked as Defendants' Exhibit 187 in lieu of what had been previously marked as Exhibit 187?

Mr. Williams: No objection.

Mr. Davis: After that has been done, Mr. Leslie, I will ask you to read those minutes for the purpose of orienting yourself on this financing, and then we will go back to where we were.

(Photostat of Minutes of the Board of Directors Meeting, Transcontinental & Western Air, Inc., December 9, 1947, marked Defendants' Exhibit 186 for identification, as of this date.)

(Photostat of Minutes of the Board of Directors Meeting, Transcontinental & Western Air, Inc., February 27, 1948, marked Defendants' Exhibit 187 for identification, as of this date.)

The Witness: I have read both the minutes of December [fol. 15156] 9, 1947 and February 27, 1948, minutes of the Board of Directors meetings.

By Mr. Davis:

Q. Are you now oriented in your own mind as to the manner in which those twelve 749s were in fact financed by TWA?

A. Yes, I am.

Q. Picking up with the statement which appears in the minutes of October 30, 1947, Defendants' Exhibit 185, will you describe what took place and how that financing was negotiated, and in so doing, identify, to the extent which you can, the persons or parties involved in those discussions or negotiations.

A. Well, at the time of the October 30th meeting it was assumed that we would finance the twelve 749s under a credit agreement relating to those airplanes alone, but further discussion with our banks and all those concerned ended up in a larger package, which brought in and refunded the obligations on nine airplanes theretofore purchased.

Q. Which nine are you referring to?

A. That is the purchase of five on 5/13/46 and four on 3/27/47, and in effect refunding those obligations with the new financing, i.e., the $1,238,000 of 5/13/46 and the $2,815,000 of 3/27/47 were taken up in a new—along with the [fol. 15157] twelve 749s—in a new series of notes dated 3/25/48, in the amount of $17,945,000. So now my mind is clear as to—

Q. It is now clear that Defendants' Exhibit 205 does in fact refer to every financing undertaken by TWA, is that correct?

A. That is correct.

Q. What I would like you to do is to describe as fully as you can the substance of the discussions or negotiations which took place in connection with this financing, which, as I now understand it, involved the twelve 749s referred to in Exhibit 163 as having been contracted for on November 18, 1947, as well as the nine Lockheed 049s referred to in that exhibit as having been contracted for on May 13, 1946 and March 27, 1947.

What I would like you to do now, Mr. Leslie, is to tell us what happened.

A. The course of negotiations between TWA and its banks and Lockheed, which also had an interest in certain of the securities, ended up with a financing agreement that encompassed the new purchase plus really the refunding of the previous notes into the new larger note.

Q. I understand the end result. Now what I want you to do is to describe as fully as you can the discussions or [fol. 15158] negotiations which took place which bring about this result with the banks, Equitable, Hughes Tool Company, if they were involved, Mr. Hughes, if he was involved.

[fol. 15159] A. Put it this way: The Mellon Bank and the Bankers Trust Company had conventionally taken 50 per cent of the credits between themselves, and the negotiations were basically between TWA, the Mellon Bank and Bankers Trust Company over a substantial period of time on how we, with our thin credit, were going to work out this problem, and with many weeks of work, this is what eventuated between TWA and basically the two lead banks, and, incidentally, gaining the agreement of the Equitable to the transaction.

Q. Do you recall at what point TWA approached the Equitable with respect to this financing or acquisition of aircraft?

A. In conjunction—they were approached in conjunction with the proposal to finance as it was necessary to gain their approval to any plan.

Q. Who on behalf of TWA actively conducted discussions or negotiations with the lending institutions?

A. I did.

Q. Did Mr. Cohu participate with you?

A. Yes, to a certain extent.

Q. Did you also contact the Equitable with respect to any consent required of them?

A. I did.

Q. Did Mr. Cohu also participate in that?

[fol. 15160] A. I don't believe Mr. Cohu appeared, no.

Q. Can you tell us at what point in this program you approached the Equitable; namely, was it before you engaged in discussions with the banks, while you were conducting discussions with the banks, or after you had completed your discussions or negotiations with the banking group?

A. I believe the proposed financing was discussed with the Equitable, and it was only at the time at which there was a firm plan arrived at at which we asked the approval of the Equitable.

Q. Before you asked formally for their approval, can you tell us what took place, what, in substance, you told them, and what, in substance, the Equitable told you?

A. I can only say that the Equitable was kept informed of what we were doing as a major creditor by a number of meetings with Mr. Dow.

Q. Did any representative of the Equitable join or participate in the discussions going on with the banking group?

A. Not at all.

Q. Did you have occasion of discussing with the Equitable the possibility of financing the alternative acquisitions which the minutes reflect were being considered at the time?

[fol. 15161] A. The alternatives were not pursued to any great extent.

Q. Can you describe or identify the kind of information or material which you submitted to the Equitable in connection with these discussions which led to their consent?

A. No, I think that the material which we were submitting to the banks, the forecasts, were made available to the Equitable at this time.

Q. Will you identify or describe the nature of the forecasts or other information which you made available to the banking group in connection with the discussions you were having with them?

A. I would say that there were forecasts submitted showing the prospective earnings and pro forma balance sheets running through the life of the proposed obligation.

Q. Do you recall Mr. Cocke joining you in connection with any presentation that was made to the Mellon Bank at or about that time or in connection with—

A. He basically had nothing to do with the financing.

Q. Do you recall what if any conditions or terms or requirements were suggested or imposed by the Equitable with respect to the consent that they gave?

[fol. 15162] A. I think there was a requirement that $5 million of additional equity be placed in the company within some period of time, and I don't recall what that period was.

Q. Referring to what has been marked as Defendants' Exhibit 186, the minutes of the Board meeting of December 9, 1947, you were present at that meeting, were you not?

A. What date was this?

Q. December 9, 1947. It has been marked as Defendants' Exhibit 186.

A. Okay. Right.

Q. Do those minutes correctly reflect what in fact took place at that meeting? Please read them over carefully.

A. I believe this is a fair reflection.

Q. To what extent, if any, did the Hughes Tool Company or Mr. Hughes participate in these discussions or negotiations of the financing arrangements made by TWA?

The Witness: Would you read the question, please?

(The question was read.)

A. You are now relating to the meeting of December the 9th?

Q. No, I am relating—my question was broader than that—relating to the financing arrangement that was con- [fol. 15163] summated relating to those twelve 749s and the other nine 049s that we have been talking about.

A. None at all, but I would like to add that the approval of equipment purchase related to the December 9th meeting was not ever in fact consummated in the form it was presented at that meeting.

Q. I understand that. What actually was approved is reflected in Defendants' Exhibit 187, the February 27, 1948 meeting, is that correct?

A. Yes.

Q. Still addressing yourself to what has been marked as Defendants' Exhibit 186, referring to page 3 of those minutes, I see a reference there that "These negotiations indicated the likelihood that this financing might have to be carried out through delivery of the airplanes by Lockheed Aircraft Corporation to an equipment corporation to be formed for the purpose of acquiring the same, which equipment corporation would lease them to this corporation for a period of five years," et cetera, and I am trying to understand what that refers to, and what was taking place at that time, as reflected by these minutes.

Can you tell us that?

A. This was a legal device which was proposed that appeared to be a desirable way to gain the security re- [fol. 15164] quired by the banks.

Q. Who proposed that device for the purpose of giving the security to the banks?

A. The bankers involved.

Q. At that time were you discussing or trying to negotiate a financing which would involve merely the security of the aircraft involved without the general credit of the corporation or were you still discussing at that time something which involved the general credit of—

A. Not at all. The device would have made it simpler to get at the collateral in case of a receivership for the airline. They set up an equipment corporation and leased the equipment to the carrier, and in case of a receivership or default, they could easily recapture their collateral.

Q. The Equitable had no part in the development of this proposal or device?

A. None at all.

Q. Refer to what has been marked as Defendants' Exhibit 187, which are the minutes of the Board meeting of February 27th. You were present at that meeting also, were you not?

A. Yes, I was.

[fol. 15165] Q. Will you carefully read the minutes which appear under the heading "Approval of Purchase of Twelve Model 749 Constellations and Related Equipment"?

A. I have done so.

Q. Can you tell us whether or not those minutes fairly and accurately reflect what in fact took place at that time?

A. I believe they do.

Q. If you look at page 7 you see that there is a reference —I am looking at the last paragraph on that page, Mr. Leslie—there is a reference to an explanation by the president that the consummation of the transaction required the approval of the Equitable as a holder of $40 million of sinking fund debentures.

That refers to the two security issues to the Equitable you previously have identified, one for $30 million and the other for $10 million?

A. That's correct.

Q. Then it also refers to the approval of Hughes Tool Company as holder of the subordinated convertible notes of the corporation, as modified by the agreement dated December 26, 1947, between this corporation and Hughes Tool Company.

What does that refer to?

[fol. 15166] A. Only that the Hughes Tool notes also had a restriction on borrowing.

Q. This related to the provisions of the subordinated convertible notes which were issued to the Hughes Tool Company in January 1947 in the principal amount of $10 million?

A. That's correct.

Q. Was that consent obtained, and if so, how?

A. It was obtained, but how I fail to remember. There was no problem. It was obtained.

Q. In connection with that transaction, was there any condition expressed or implied that you are aware of or know anything about relative to any obligation by TWA to acquire aircraft only through the Tool Company or from the Tool Company?

A. None at all.

Q. There is a reference also to the Wright Aeronautical Corporation. Can you describe or identify just how they were involved in this transaction?

[fol. 15167] A. This was—this financing took place at a time when Lockheed's resources were marginal, limited, and the airframes were the manufacture of Lockheed, the engines were owned by Curtis Wright, and the propellers by Wright Aeronautical, and they were joined as bankers in the transaction in advancing funds.

They appeared on the credit agreement as bankers as lending funds.

The transaction was with—for the purchase of aircraft, twelve 749s, from Lockheed, Curtis Wright and Wright Aeronautical, one representing the airframes, two, propellers, three, the engines.

Q. When you refer to their advancing funds—let me see if I understand what was taking place—were they in effect buying these equipment mortgage notes totaling $17,945,000, or were they advancing funds separately and independently of those notes?

A. They were really taking their payment in notes for their portion of the deal, paid in notes.

Q. Can you tell us approximately to what extent TWA used any part of its own cash resources in connection with this transaction?

A. I don't remember the cash payments which were made by TWA in connection with this financing, but they were—[fol. 15168] whatever the cash, it was quite a small proportion of the whole.

Mr. Davis: Let me mark for identification at this point as Defendants' Exhibit 206 this document dated March 2, 1948, which was obtained by us from the files of the Equitable.

(Photostat of document dated March 2, 1948, consisting of two pages, marked Defendants' Exhibit 206 for identification as of this date.)

Q. Have you had an opportunity to read what has been marked as Defendants' Exhibit 206?

A. Yes, I have.

Q. Does that fairly and accurately reflect the transaction which in fact took place?

A. I believe it is a fair statement, and I note that what I had said before requires a slight change, that Wright Aeronautical supplied the engines and Curtis Wright the propellers.

I had said before that Curtis Wright supplied the engines and Wright Aeronautical the propellers.

Q. I notice in the next to last paragraph of this memorandum—and I wish you would give me the correct dollar figures; some of it is a little blurred—it reads:

> "A maximum of $18,800,000 of the 3 per cent notes [fol. 15169] are to be issued. Participants in the financing are a group of fourteen banks . . . ,"

and the dollar figure with respect to that is $16,300,000. Is that what the figure is? What is the figure there?

A. It would be $16,300,000.

Q. Wright Aeronautical Corporation was to take $2,300,000 and Curtis Wright Corporation $200,000?

A. That's correct.

Q. This also states that the lien on the notes to be issued was not to cover thirteen other Model 49 Constellations. Can you explain how that came about?

A. No one required that they be put forward as collateral.

Q. Going back to Defendants' Exhibit 205, Mr. Leslie, I note that the next financing transaction appears under date of February 1, 1949, and is entitled "Conditional Sale Contract, 3 per cent due 12/1/53," in the amount of $1,62.000. Can you first identify and describe what that involved?

A. I believe that that conditional sales contract related to the purchase of two 049 aircraft from the Hughes Tool Company.

Q. Can you describe how that came about?

[fol. 15170] A. I believe the Hughes Tool Company owned one 049 which they had used for some work at the Hughes Aircraft establishment, and that there was another aircraft there that had been re—ex-Army aircraft that had been modified to airline standards by someone in the east which was purchased by the Hughes ~~Aircraft~~, and, as a matter of convenience—as a matter of convenience, and then was sold to TWA, both of them at their cost.

Q. The Hughes Tool Company cost?

A. The Hughes Tool Company cost.

Q. Let me refer you to what has been marked as Defendants' Exhibit 138, which is a prospectus of TWA dated February 18, 1949.

Do you have that before you? Look at page 22, under the heading "Relations with Hughes Tool Company." You see there a reference to and a description of agreements between Hughes Tool Company and TWA relating to a Model 049 Constellation aircraft and to a military type Constellation aircraft.

A. Well, the net effect is the same. The intermediate transactions are a little more involved than I had remembered.

Q. That is the transaction you were referring to in your testimony before I referred you to this prospectus?

[fol. 15171] A. That's correct.

Q. Will you read carefully what appears on page 22 for the purpose of telling me whether or not your present recollection is that this accurately describes the facts that took place, which took place.

A. I think that is correct.

Q. There is a reference there to approval by the Board, by the CAB, with respect to that transaction. Do you see that?

A. Yes, I do.

Q. There is a statement there that prior thereto the aircraft were used by TWA without charge. Is that a true fact?

A. I believe so.

Q. Can you tell us how that came about, what occurred which brought about this transaction between TWA and the Hughes Tool Company?

A. Well, I believe that TWA discussed the acquisition of these two aircraft with the Hughes Tool Company, and recognizing the fact that there was a linkage, there was a time period involved in gaining CAB approval, there had to be—there could be no dollar transaction occur until it was approved, that TWA undertook to, by agreement with TWA, to fly the airplanes, use the airplanes, without charge, [fol. 15172] in anticipation of final approval.

The Special Master: You say "TWA by agreement with TWA."

The Witness: If someone wanted, they could strike all of that, and I will reanswer it. It gets pretty sorry, I must say.

Q. Why don't you restate your answer as you intend it to be, Mr. Leslie.

A. TWA negotiated with the Hughes Tool Company the purchase of the two airplanes concerned. Requiring the use of the airplanes, and recognizing the time period which would be necessary to gain CAB approval to a transaction between the two companies, the Hughes Tool Company agreed to the use of the airplanes by TWA without charge, pending approval.

Q. Look at Defendants' Exhibit 138. Let me refer you to what appears on page 21.

In the paragraph immediately following the description of the financing of the twelve Model 749s the following appears. You will note the date of this prospectus is February 18, 1949:

> "Because of the expense involved it is TWA's present policy not to attempt to develop new aircraft, but rather to follow closely the efforts of aircraft manufacturers [fol. 15173] in that connection."

First of all, let me ask you, is that an accurate statement of the fact?

A. I believe it is an accurate statement.

Q. Can you tell us what the origin of that policy was or how it came about?

A. Certainly TWA had not engaged in the development of any aircraft since they worked closely with Lockheed in about 1940 or 1941 in connection with the Constellation development.

One would almost argue that that is just a filler, the statement is just a filler. It is of no significance at all.

It is a non sequitur. They are an airline, not an aircraft manufacturer.

Q. Will you turn to page 22. You see there in the middle of the page the statement which reads as follows:

> "Transactions between TWA and Hughes and its subsidiaries, excluding air transportation purchased by Hughes, have been as follows,"

and then there are the years 1944, 1945, 1946, 1947, and the first eleven months of 1948 set forth with two other columns headed "Due Hughes" and "Due TWA."

Do you know of any transactions between TWA and [fol. 15174] Hughes for those years other than as reflected by what appears on that page?

A. There were no other transactions.

The Special Master: We will recess.

(Whereupon, a short recess was taken).

[fol. 15175] By Mr. Davis:

Q. Mr. Leslie, this acquisition of two aircraft by TWA from the Tool Company that you have been referring to was a subject of an approval by the CAB, was it not?

A. It was approved by the CAB.

Q. Let me hand you what has been marked as Defendants' Exhibit 137, which is an application to the CAB for approval of the purchase by TWA of two Constellation airplanes from the Hughes Tool Company (handing to witness). Are you familiar with that document, Mr. Leslie?

A. I was at one time.

Q. Let me particularly refer you to the facts set forth in the numbered paragraphs on that application, and ask you to read them carefully.

A. I have read it.

Q. With respect to the facts set forth in paragraph 2, are those facts accurate, so far as you know?

A. They are.

Q. Will you look at paragraph 3, which refers to the use of those aircraft by TWA on a no charge basis, and which refers to a letter from the Board dated October 6, 1948, which is annexed as Exhibit 3 to what has been marked as Defendants' Exhibit 137.

I believe you previously testified that those aircraft were [fol. 15176] used by TWA on a no charge basis. That is correct, isn't it?

A. I believe that they were.

Q. You see what has been marked as Exhibit 3?

A. I have read it.

Q. Do you recall what discussions, if any, took place at TWA with respect to the need of TWA for those aircraft and the need for the arrangement which was made with the Tool Company?

A. I believe that TWA believed—I believe that TWA stated to the Hughes Tool Company its need for the airplanes if they could be made available.

Q. Let me refer you to what appears in paragraph 4, which refers to the affidavit of Mr. Pierson, and which states certain facts with respect to those two aircraft. Are those facts true, so far as you know?

A. I believe they were true at the time.

Q. I particularly call your attention to that portion of paragraph 4, the affidavit of Mr. Pierson, to the effect that the price to be paid by TWA for those aircraft is substantially below the price paid by TWA for airplanes of the same model which TWA had purchased from Lockheed in May of 1947. Is that a true statement of the fact?

A. Yes, it is correct.

[fol. 15177] Q. I understand from your prior testimony, I believe, that the Tool Company turned over these aircraft to TWA at its cost. Is that correct?

A. That's correct.

Q. How did TWA satisfy itself, if it did, that those aircraft were acquired at Hughes Tool Company cost?

A. I believe the company went over the—over statements supplied by the Hughes Tool Company, and the Lockheed modification charges, and assured itself that it was cost, and that the Tool Company stated that as a fact to the CAB as well.

Q. Going back to what has been marked as Defendants' Exhibit 205, I see the next transaction, financial transaction, by TWA which you have listed is under date of February 6, 1949, and is described as a common stock offering of 404,112 shares issued for $3,838,756.

That is the offering which is reflected in the prospectus which has been marked as Defendants' Exhibit 138?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. Will you tell us the circumstances which led to this common stock offering, what it was for?

[fol. 15178] A. I believe that a condition imposed by the Equitable in giving their consent to the issuance of the 3 per cent equipment mortgage notes due 5/31/53 required the addition to—the addition of $5 million to TWA's equity base within a given period of time, however that was done, and this stock issue was undertaken in connection with that requirement.

Q. Were you referring to a requirement of the Equitable in connection with or as a condition to their consent to the approximately $18 million of equipment mortgage notes which were issued by TWA in March of 1948 relative to the financing of the twelve 749s and the nine 049s?

A. This is my memory.

Q. This offering took place at or about the time that Mr. Damon became president of TWA, isn't that right?

A. I believe you are correct.

Q. Do you want an opportunity to examine Defendants' Exhibit 138 a little more carefully, Mr. Leslie, to orient yourself?

A. Well, certainly it was just after Ralph Damon joined TWA.

Mr. Davis: At this time, Mr. Special Master, I would like to mark as an exhibit the minutes of the meeting of the Board of TWA which was held November 12, 1948.

[fol. 15179] At the moment what we have we believe to be the minutes in their final form. There may have been a final draft before they were in final form. We have not yet obtained from TWA photo copies of the minutes themselves. So I would like to have these marked now, with permission, if I may, to substitute the photo copies of the minutes furnished to us by TWA.

Mr. Williams: No objection.

The Special Master: Leave granted.

(Photo copy of Minutes of the Board of Directors Meeting, Transcontinental & Western Air, Inc., November 12, 1948, marked Defendants' Exhibit 207 for identification, as of this date.)

Q. Mr. Leslie, I apologize for distracting your attention for the moment on a different subject, but while Defendants' Exhibit 207 is before you, there are a few relatively minor matters I would like you to clarify.

You were present at that Board meeting, were you not?

A. I was.

Q. If you turn to page 4, you will see there a reference to you. As a vice-president and treasurer, you presented to the meeting an agreement relating to the use by TWA of certain aircraft owned by the Hughes Tool Company. [fol. 15180] You see that reference on page 4?

A. Yes, I do.

Q. Can you tell us what that was about?

A. I believe this related to the loan of an airplane to TWA by Hughes Tool Company.

Q. This aircraft number 1970, was that a Lockheed?

A. It was a model 049 Constellation.

Q. Which had been acquired by the Hughes Tool Company?

A. It is one of the two airplanes which we have been discussing, the two airplanes being numbered 1969 and 1970.

Q. Turn to page 5, and you see there a reference to the ratification of an agreement covering the purchase from Hughes Tool Company of Constellation aircraft 1969 and 1970.

That refers to the two aircraft we previously have been discussing and which were submitted to the CAB for approval?

A. That is correct.

[fol. 15181] Q. Do the minutes which appear under the heading I have just indicated correctly set forth the facts which occurred?

A. I believe they were—they are correct.

Q. Let me call your attention to the statement that the chairman of the meeting advised that the management of this corporation recommended purchase of the aircraft because they were required in order to meet competition in equipment, and because management considered the aircraft at the price indicated a bargain for the corporation. Is that a true statement of what the management of TWA at that time recommended?

A. That is what it believed.

Q. You see in the next paragraph it states:

> "During the discussion which followed, it appeared likely that the Equitable Life Assurance Society as a holder of the corporation's debentures would ask that the transaction take the form of a conditional sales agreement substantially under the same terms and conditions, except that in the event of default the remedy of Hughes Tool Company would be only to repossess the planes."

Can you tell us what that refers to?

[fol. 15182] A. I believe it was inherent in the Equitable indenture that there was no limitation on the right of the company to execute conditional sales agreements where there was no recourse because in fact the conditional sales agreement would be nothing more than a month-to-month lease—that is what it boiled down to—so that this statement here obviated the need of the approval by the Equitable of the transaction.

Q. Had there been some discussions with the Equitable for their consent in connection with—

A. There had been.

Q. Were you the one who discussed that with the Equitable?

A. I am reasonably sure that I was the one that discussed it, yes.

Q. Did the Equitable in fact require that the arrangement be on the basis of a conditional sales contract with no recourse?

A. That's correct.

Q. That is in fact what took place?

A. That's correct, yes.

Q. If you will turn to page 8 of the minutes of November 12, 1948, you see some minutes under the heading "Proposal To Offer Additional Common Stock Pro Rata To [fol. 15183] Stockholders." First read those minutes carefully, please.

A. I have read them.

Q. Do they correctly set forth what took place at the time? A. Yes.

Q. This refers to a report which you made, does it not?

A. That's correct.

Q. It states that for some time work had progressed on the preparation of a registration statement in contemplation of a possible sale of common stock before the end of the year, and apparently you also reviewed for the Board previous discussions with the bankers relating to the possibility of a public offering to stockholders, either with or without an underwriting.

A. Yes.

Q. Can you describe a little more fully than you already have the discussions with the bankers along those lines, and the development of this program for an offering to the stockholders, with or without an underwriting?

A. Well, this relates to discussions which basically were confined to Merrill Lynch as the prospective underwriters, [fol. 15184] as to whether or not they could sell stock, how much, how much it would cost, all those things which are normally considered in the selling of stock to the public, and we had progressed at that time to a point where we prepared to go to the market.

Q. I note that in connection with the resolution adopted in this matter, and also in connection with the resolution relating to the transaction between TWA and the Tool Company, Mr. Dietrich was not voting. Why was that?

A. I think at that time there were discussions as to how much stock the Hughes Tool Company would take up in case of an offering, and since he spoke for the Tool Company on the matter, I think he disqualified himself, as having two hats, to vote on the matter.

Q. I would like you to describe as fully as you can the discussions which took place, if any, between the management of TWA and the Tool Company or Mr. Hughes relative to this aspect in connection with the financing by the issuance of additional shares of common stock. Will you tell us what took place?

A. Well, I think we must keep in mind something about which you have not questioned me, that this sale of this stock was required by an agreement which existed between [fol. 15185] the Hughes Tool Company and the Equitable.

Q. Tell us about that.

A. I am not sure as to—I am not sure in my mind right now as to just what time period was called for within which time it was required that this stock be sold, but I believe we were getting up against the outside date by the end of November, by this November Board meeting. It was a foregone conclusion then that we would attempt to sell stock, and in any event, the Hughes Tool Company had undertaken to guarantee that $5 million, however it was found, of equity would be placed in TWA by a final date, again, which I am not quite clear on.

This discussion was related to meeting this deadline date.

Q. Following what you are saying, Mr. Leslie, I am not clear in my own mind whether you were referring to an undertaking by the Tool Company relative to this particular offering of 404,000 shares, which raised some $3,800,000, or whether it was the result of a commitment with the Equitable for at least $5 million of equity to be raised by a certain time, which I had associated with the Martin program. But you know the facts, and I am merely trying to understand them.

This offering that we are now talking about did not raise [fol. 15186] $5 million of equity, did it?

A. I believe, all around the board, yes, that there was $5 million raised.

Q. Let me understand what your recollection is as to the nature of the agreement or understanding between the Tool Company and the Equitable.

Mr. Hupper: You are simply exploring what the witness' understanding was of the agreement between the Tool Company—

Mr. Davis: That is what my question is.

Mr. Hupper: I wanted that to be doubly clear on the record.

[fol. 15187] A. I believe there was in fact $5,000,000 raised through this offering, and that it related to a requirement of the Equitable, it had nothing to do with the *Martin purchase.*

Q. Now identify or describe this requirement of the Equitable, what—

A. I need to be refreshed on this matter, but I think the record will show the first time that there was a demand made by the Equitable for the infusion of new equity money.

Q. Can you describe or identify the document or the record that you have in mind?

A. This is fourteen years ago. I can only say that I am sure that this is what this stock offering—behind this stock offering is, I believe, a side letter, an agreement, between Equitable and the Hughes Tool Company.

It was undertaken that TWA—there would be $5,000,000 added to the equity of TWA by a given date as a condition of approval for the financing under the equipment mortgage note of 3/25/48.

Now, I may be wrong, but this is what my memory tells me. And it needn't—and it would not, necessarily—I don't see why it would show on the Board meeting of TWA. [fol. 15188] Nevertheless, I believe—

Q. At the moment what I want is your recollection—

A. This is my recollection.

Q. (Continuing) —of what was happening. I am interested in what discussions, if any, took place with TWA and the Hughes Tool Company or Mr. Hughes, if any did take place, relative to this stock issue.

A. Certainly the management of TWA and Leslie, speaking for Leslie, certainly agreed it would be highly desirable for TWA to have more equity than existed prior to this issuance, and it would be in the best interests of the company to sell stock, and discussions were held with Merrill Lynch, and with the Hughes Tool Company, concerning it.

The Hughes Tool Company undertook to purchase an amount over and above that offered to the public to give a minimum of $5,000,000 in proceeds to TWA.

Q. I am interested in who had these discussions with Merrill Lynch.

A. I had them.

Q. Do you know of anyone else at TWA who had those discussions with Merrill Lynch?

A. Certainly there were discussions by the Hughes Tool Company with Merrill Lynch in addition, because there [fol. 15189] was the point on how much of the stock in fact the Hughes Tool Company would take up.

Q. That is what I want you to identify and describe, Mr. Leslie, those discussions with Merrill Lynch, TWA, who was involved, what was said, discussions of which you have any knowledge or information, acquired from whatever source, identifying the source, if you can, discussions between the Tool Company and Merrill Lynch, and what was said. Can you do that for us?

A. It's difficult to detail what was said. We—

Q. The substance of what was said, if you can't remember—

A. The substance of what was said was that we were going to undertake to raise $5,000,000, and establish a price at which this could be done, and as to the backing that the Tool Company would give a success of the issue.

Q. That is what I want you to describe a little more fully. You are giving me the substance in terms of ultimate end results.

A. All I can say is discussions. I can't tell you the detail of the discussions. There were many discussions, but they all revolved around the normal negotiating in dealing with the stock issue.

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[fol. 15212] Examination (Cont'd).

By Mr. Davis:

Q. Mr. Leslie, at the close of the last session you were trying to orient your recollection with respect to events connected with the common stock offering by TWA which took place on February 6, 1949. I have collected a number of documents which I believe will assist you in describing what was taking place at that time.

Before doing so, however, I would like to ask you if there is anything that you have recalled or which you would like to say at this time to explain, correct, your testimony to date.

A. I have nothing to add.

Mr. Davis: Let me first mark for identification as Defendants' Exhibit 208 this document.

(Photostat of memorandum headed "TWA, Inc.," dated [fol. 15213] October 26, 1948, from Ralph S. Euler, marked Defendants' Exhibit 208 for identification, as of this date.)

By Mr. Davis:

Q. Mr. Leslie, what has been marked as Exhibit 208 is a document that we obtained from the files of the Mellon National Bank & Trust Company. This represents the first document that we have been able to identify to date as a possible genesis for what subsequently developed into the offering which was made.

I appreciate the fact that some thinking or some planning may have taken place which did not materialize. Will you first address yourself to paragraph 3 of what has been marked Defendants' Exhibit 208? You see there that there is a reference which reads:

"Leslie states they are hopeful of doing about a $10 million stock deal with Fenner, Beane, whereupon consideration would be given to a substantial reduction in their equipment loan. Conditions could be such as to capitalize the entire equipment loan through the issuance of a $10 million stock issue."

The memorandum deals generally with Mr. Euler's notes as a result of the meeting that you had with him, and which apparently related to the cash position of TWA and [fol. 15214] its anticipated cash position.

Will you first give us your recollection of that meeting or discussion with Mr. Euler, and with particular reference to what was then contemplated with respect to a possible stock offering?

A. I don't remember anything about this conversation with Mr. Euler.

Q. What about that portion of paragraph 3 I particularly called to your attention, what is your recollection with respect to that?

A. I have no specific recollection relative to this conversation, and I could only add that there had been conversations with Merrill Lynch, Fenner, Beane relative to the sale of stock, and I still believe that it will be determined that the sale of stock which is under consideration was made as a result of a requirement by the Equitable. [fol. 15215] Q. I am not trying to dissuade you from that thought, Mr. Leslie. I will show you in a moment some documents which I believe relate to what you have in mind.

At the moment I am trying to start a little earlier, and I want you to give me your full and complete recollection of whatever discussion took place of which you are aware relative to the possibility or consideration which was given to a stock issue for the purpose indicated in this memorandum by Mr. Euler which has been marked as Defendants' Exhibit 208.

Let's talk about that first.

A. The Mellon Bank and the Bankers Trust Company were considered to be the lead banks for TWA.

As a result of this, I had numerous conversations, keeping both of those banks informed as to our position. The financial status of the—the financial position of the company at the time will reveal that there was a very large proportion of debt to equity, and there had been discussions as a matter of course relating to this excessive debt structure, debt capital structure.

Q. It is those discussions which I am trying to get you to identify, who was involved in those discussions, and what was said.

A. Fine. The discussions were confined to Mr. Dietrich, [fol. 15216] Mr. Maurice Bent of Merrill Lynch, and myself.

Q. Tell us what was said.

A. But there was not one conversation, there were a number of conversations relating to the possibility of selling stock.

Q. That is what I want you to describe now, identifying to the extent which you can, a particular conversation or meeting, if you recall one. What I want you to give me now is the substance of those discussions, the position taken by the participants in those discussions, if they took positions, the problems which were being discussed, or obstacles that existed or didn't exist.

What I want you to do now is to tell me what happened at that time.

A. I am unable to recall anything specific about the discussions that took place, other than to observe that it was agreed, with the general status of the airline industry at that time, and the particularly serious financial situation of TWA, in terms of a normal capital structure, that the sale of stock would be difficult if, indeed, possible, and there were conversations that related to or the conversations included the consideration of how much stock, what percentage of any stock issue the Hughes Tool Company would take up.

Q. At that time did you have pre-emptive rights, were [fol. 15217] the stockholders entitled to subscribe to their pro rata share of any stock offering?

A. There are no pre-emptive rights, there were no preemptive rights.

Q. Were there some discussions between Mr. Bent, Mr. Dietrich and yourself as to whether the Tool Company was prepared to commit itself to take its pro rata share of any stock offering?

A. There was nothing definitive said.

Q. I understand that. I want to know what was being discussed, what was being asked, if anything, by any of the parties to the discussion.

A. It was held by Merrill Lynch, i.e., Maurice Bent, that the success of selling any stock would depend upon the Hughes Tool Company undertaking to take up a substantial portion of it, and, obviously, directly, no underwriting problem, but to sub-underwrite, if you like, any substantial offering, i.e., ready to stand behind the lack of the general market coming along and picking the stock up.

Q. Did those discussions at that time relate to the willingness of Merrill Lynch to underwrite a stock offering, the size of a stock offering which they would be willing to underwrite—was that the subject of discussion?

A. That was the basic topic of discussion.

[fol. 15218] Q. Did there come a point when Merrill Lynch indicated whether they were willing or were not willing to enter into a firm or other type of underwriting commitment?

A. With the passage of time, there was a stock issue.

Q. Underwritten by Merrill Lynch?

A. Underwritten in part by Merrill Lynch.

Q. I am referring now, however, to this $10 million stock deal which apparently you were discussing or describing to Mr. Euler of Mellon Bank.

Can you tell us whether or not, with respect to that $10 million stock offering, Merrill Lynch came to the point where they indicated whether or not they were willing to underwrite that size offering?

A. They came to the conclusion that they could not underwrite a $10 million stock offering.

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[fol. 15223] By Mr. Davis:

Q. Mr. Leslie, this memorandum by Mr. Euler was dated October 26, 1948. The next document that has come to our attention relating to what was then currently under consideration are the minutes of the meeting of the board of [fol. 15224] November 12, 1948, which has been marked as Defendants' Exhibit 207 (handing to witness).

You will notice that on page 8 there is a reference to a proposal to offer additional common stock pro rata to stockholders.

You see that those minutes state that for some time work had progressed on the preparation of a registration statement and audit as of July 31, 1948, in contemplation of a possible sale of common stock before the end of the year.

I am trying to find out what it is that was being worked on or contemplated as of November 12, 1948. In that connection, let me refer you to the last portion of the minutes, which state that a discussion followed in which all the directors participated as to the desirability of offering shares to stockholders at this time, and then the reference that the view was generally expressed that an offer of from 400,000 to 500,000 shares might be considered, that a price of $10 per share would be hoped for, depending upon market conditions.

Does any of this refresh you as to what was then under consideration, leaving aside for a moment whether or not there was any requirement or request by the Equitable?

A. This does refresh my mind. Certainly the time ele- [fol. 15225] ment between the memorandum of Mr. Euler and this is so close, I had not before realized that we had gone as far at that time as we must have gone.

We were talking to Merrill Lynch during this period about the sale of stock, and to talk with any assurance it would have been required that an interim audit, to have an effective registration statement, would run out. We would have been required to have an interim registration, an interim audit, and apparently had undertaken this, and had our group, including our counsel, working on the preparation of a registration statement. I would point out that those things were necessary to be able to talk more definitively than just conversation.

Q. I am trying to understand what was then contemplated. The heading in the minutes refers to a "proposal to offer additional common stock pro rata to stockholders."

Was that in fact what was then under consideration, and if so, how did that thought develop, and from whence, and what was the position of Merrill Lynch with respect to this program?

A. Certainly it was contemplated at that time that there would be a rights offering, any sale of stock would be done under a rights offering.

Q. In other words, it was contemplated—

[fol. 15226] A. Which is another way of stating to offer stock pro rata.

Q. That's right. It was going to be a rights offering to all stockholders?

A. That's right.

Q. So as to give them an opportunity to subscribe to their pro rata share?

A. That's right.

Q. And Merrill Lynch was going to underwrite the portion that the stockholders might not subscribe to?

A. This was the mood at that time. It had not been determined then as to just how it would be done, whether it would be an underwriting or whether, in fact, the Hughes Tool Company would undertake to—

Q. Pick up whatever the other stockholders did not?

A. That's right.

Q. That is what that reference in the minutes is, is it not, a discussion was had as to whether or not the offering should be an offering underwritten by Merrill Lynch or not?

A. No. The question—let's not say no so exactly. It had not been determined at that time that Merrill Lynch would be willing to underwrite the issue completely. This was—

Q. At that time an effort was being made to determine [fol. 15227] whether Merrill Lynch would be willing to underwrite the portion not subscribed for by the stockholders, is that correct?

A. This discussion was being then carried on, yes.

Q. I am trying to get you to identify the principal aspects of the discussions going on, Mr. Leslie.

A. The answer is really fairly simple, that TWA had a poor earnings record, it had an excessive relationship of debt to equity, the market at the time was not—the general situation at TWA was such that it was quite chancy as to whether or not the market, the stockholders, by way of taking up rights, or the market generally, could absorb an amount of stock that was contemplated, which at this time was about $5 million.

Q. I understand that. What I am trying to determine as well as I can, Mr. Leslie, is this: Is it a fact that you and others on behalf of TWA were having discussions with Merrill Lynch in an effort to determine whether Merrill Lynch would be willing and the extent to which they would be willing to underwrite an offering to the stockholders?

A. We were.

Q. Is it correct that in those discussions Merrill Lynch was indicating that they would consider such an underwriting provided the Tool Company commit itself to pick up [fol. 15228] its pro rata share?

A. This was a part of the discussions, but at this time there was nothing definitive to report on what their view was.

Q. I am trying to get you to describe the discussions which were taking place with Merrill Lynch, what Mr. Bent was saying, what Mr. Dietrich was saying, what you were saying, in that area.

A. Well—

Q. If it—

A. In substance, here was a thin issue, and Merrill Lynch were trying to make up their mind as to whether or not they would venture their funds and others in a syndicate without support or not, and hadn't arrived at that decision at this time. And this was under discussion backward and forward.

Q. It was in those discussions that Merrill Lynch was trying to determine the extent to which the Tool Company intended to or was prepared to commit itself to subscribe to its pro rata share?

A. The accent was the other way, I may say. Rather than what the Tool Company would do, to make up their mind what they would do. To the extent they wouldn't do something, they wouldn't commit their funds, you were [fol. 15229] left with a dollar gap or how would the balance be handled.

It wasn't an attempt on the part of Merrill Lynch to force the Hughes Tool Company to take up any certain proportion of stock. It was how much support might be needed to accomplish the ends that TWA had in view.

Q. I understand Merrill Lynch was not trying to force the Tool Company to do anything. I am trying to get you to express yourself in describing what those discussions were, and I am leading you a little bit, Mr. Leslie, because—

A. Well, I am not evasive at all in my answer.

Q. I understand that.

A. I can only say the normal backing and filling of a corporation intent on selling stock, of an underwriting house intent on making sure that it was a profitable transaction for them, and all those considerations which are normal to such practice.

Q. At that time were you keeping the banking group or the insurance company, the Equitable, informed as to the progress of those discussions, do you recall?

A. I am sure that I was.

Q. Both the banks and the Equitable?

A. I am quite sure that I talked with them many times about our situation, kept them completely informed.

Q. Mr. Leslie, the next document which we are aware of [fol. 15230] at this time relating to what we have under discussion is this document which I will ask be marked as Defendants' Exhibit 209.

(Photostat of memorandum dated January 7, 1949, to Mr. F. A. Shailer, consisting of four pages, marked Defendants' Exhibit 209 for identification, as of this date.)

Q. First, Mr. Leslie, will you identify Mr. Shailer?

A. Mr. Shailer was the financial—without being exact about the term, the financial vice-president—no—the vice-president in charge of investments of the Equitable Life.

Q. What was the relationship of Mr. Dow to Mr. Shailer, do you know?

A. Mr. Dow at that time was in charge of the industrial investment activity under Mr. Shailer.

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[fol. 15233] Q. Let's look at the first page, Mr. Leslie, which reads:

"Mr. Noah Dietrich, executive vice-president of the Hughes Tool Company, has asked us what modifications of the terms of the TWA debentures we would be willing to consider in order:

"(1) To induce Hughes Tool Company to provide additional equity funds through purchase of common stock. He mentioned their willingness to subscribe to their pro rata share of an offering of common on the basis of one share for each five held which (at $10 per share) would amount to about $3 million for the Tool Company's subscription, "and (2) To facilitate the engagement of a new president for TWA, through lightening the company's sinking fund obligations—thus improving the financial prospects of the line under its new top management."

Then it goes on with suggested revisions.

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[fol. 15234] By Mr. Davis:

Q. Mr. Dietrich at that time was a member of the Executive Committee, was he not, of TWA?

A. I believe he was, yes.

Q. Do you know whether or not TWA did in fact approach the Equitable for the purpose of obtaining a modification of the terms of the TWA debentures which they held?

A. TWA had interested itself—TWA had held discussions with the Equitable relative to the issuance of common stock, and had been present at the discussions which the Hughes Tool Company had with them on the same topic, i.e., I accompanied Mr. Dietrich on his discussions with the Equitable relating to this topic.

It was joint, there was a joint interest, insofar as the Hughes Tool Company was a substantial stockholder, and it was recognized that the sinking fund requirements were burdensome, that the company needed more equity, and it [fol. 15235] was the intent of the Hughes Tool Company to use its willingness to put more equity in to the fullest by negotiating with Equitable any concessions it could bring out of them in favor of TWA.

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[fol. 15245] Q. Do you recall whether or not in those discussions there came a time when Mr. Dietrich or someone else on behalf of the Hughes Tool Company gave some kind of assurance to the Equitable that in connection with any offering to all stockholders the Tool Company would subscribe to its pro rata share—did that take place?

A. I believe there was an understanding on the part [fol. 15246] of—I think there was an agreement on the part of Hughes Tool Company with Equitable that it would take up its pro rata share of the stock.

Q. Is it correct that in effect the Equitable, in return for that assurance, agreed to grant some relief on the requirements of the outstanding debentures?

Mr. Barr: Mr. Rankin, I object to this question, because I think this is probably embodied in some written document that sets forth the terms of the agreement, if any.

Mr. Davis: Produce the document then.

The Special Master: I think he is entitled to say what he knows about it.

Mr. Barr: If that is the purpose of the question, what he knows about it, I have no objection to it.

A. I can only say that there was a modification of the debt structure, there was a modification of the Equitable debt terms contemporaneous with the sale of stock, the details of which I do not have clearly in my mind.

There was a lengthening of the—rather, an easing of the sinking fund requirements or maturities, and there was an increase in the interest rate, but the exact amounts involved, I am not—

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[fol. 15247] By Mr. Davis:

Q. Mr. Leslie, do you have any recollection of Mr. Dietrich in any way giving some kind of oral assurance to the Equitable that if the Equitable did certain things the Tool Company would subscribe to its pro rata share of any offering to all stockholders?

[fol. 15248] A. I believe that that was the outcome of the discussions, and that it was reduced to writing.

* * * * * * *

[fol. 15268] Q. Let me call your attention to the minutes which appear on page 4 under the heading "Authorization to Execute Conditional Sales Agreement Covering Purchase From Hughes Tool Company of Constellation Aircraft 1969 and 1970." We have already identified previously the circumstance relating to those two aircraft. Note [fol. 15269] the minutes under that heading, and read them carefully.

A. I have read them.

Q. Do those minutes fairly and correctly reflect what took place?

A. I believe so.

Q. You note that this states "The meeting was advised that as had been anticipated, the Equitable Life Assurance Society, as the holder of the corporation's debentures, had requested that the transaction take the form of a conditional sales agreement substantially under the same terms and conditions as the agreement executed by Mr. Warren Lee Pierson on October 1, 1948, except that in the event of default, the remedy of Hughes Tool Company should be limited to the repossession of the aircraft."

Do you recall or can you describe how, when and who obtained this advice from the Equitable?

A. I very probably did, and they gave their consent to the transaction with the restriction that it be nonrecourse that there be no charge upon the general credit of the company in case of default.

Q. That was a different provision than the one which related to the equipment mortgage notes obtained by Lockheed and others that you previously identified?

[fol. 15270] A. That's correct.

Q. Did the Equitable give any reason for imposing that condition to their consent at that time?

A. I believe that they were a little less than enthusiastic about the acquisition of this equipment, they didn't feel as strongly as the management did as to the necessity of the equipment, and felt that it should not be—end up as a general charge on the credit of the company.

* * * * * * *

[fol. 15272] By Mr. Davis:

Q. Now, Mr. Leslie, will you look at the statement which appears on page 4 that the meeting was further advised that the Hughes Tool Company had agreed to so modify the agreement if the rate of interest on the purchase price of the aircraft were increased from 2 per cent to 3 per cent. Is that a fact which took place?

A. I believe that it did.

Q. Was the Equitable informed of that effect, namely, the position of the Tool Company desiring to increase the interest rate by reason of that condition which they insisted upon?

A. I believe that all during this period they received copies of the board minutes.

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[fol. 15282] Q. You have what has been marked as Defendants' Exhibit 210 before you, Mr. Leslie.

A. I do.

Q. For your information, this is a document which was obtained by us from the files of the Equitable, and you will note that it is dated January 18, 1949, and that it contains this paragraph:

> "The company has requested that the sinking fund requirements of the debentures be modified in order to facilitate the employment of a new president for TWA. We recommend that the sinking fund for the debentures be modified as outlined below provided that the other changes outlined (as to increased interest rate, etc.) are effected also, and provided that the company receives at least $3 million from the sale of additional common stock."

What I am interested in determining, Mr. Leslie, is whether or not there were further discussions with the Equitable subsequent to January 7, 1949 with respect to this matter of modifying the sinking fund requirements of the debentures in order to facilitate the employment of a new president and discussions as to the rate of interest which was to be modified if such concessions were granted by the Equitable. Can you—

[fol. 15283] A. I do not believe that there were.

* * * * * * *

[fol. 15424] By Mr. Davis:

Q. Mr. Leslie, will you give us your total recollection of what efforts were made in 1949 to acquire or finance some additional equipment for TWA? Without reference to any document before you with which to refresh your recollection, Mr. Leslie. Will you first give us what your independent recollection is of what happened in 1949 without benefit of the documents.

A. Failing having anything to refresh me, I could not [fol. 15425] identify whether the equipment mortgage notes, the 3 per cent notes due 4/30/55, related to the 749 aircraft or the Martins. You showed me a piece of paper which did remind me that we were talking about 749s, and talking about the financing with our bankers, and that there was a meeting with Mellon Bank on this subject.

Q. Prior to going into the details of that meeting, Mr. Leslie, at the moment I am inquiring for your recollection as to what was taking place within TWA with respect to equipment needs or the development of plans for equipment or problems of financing equipment needs, at that period, namely, during 1949.

Mr. Williams: What is the question?

Mr. Davis: To give his total recollection.

A. I think that in 1949 we were—we came to the conclusion that in the fairly near future we would need additional equipment to take care of the demands made upon us, the service demands that were in prospect, and there were—this as a result of studies made by the Traffic Department under Mr. Cocke.

We were being approached by Lockheed, amongst others, and had come to the conclusion that the purchase of these —of the block of aircraft under consideration was desirable in the interests of the company. My interest in it was to [fol. 15426] effect the financing that would be required.

Q. You started your answer by saying, as I recall it, "We came to the conclusion." Can you identify who is meant by "We"?

A. I believe "We" would be the policy making officers of the company and the board of directors.

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[fol. 15429] Q. What I would like to understand is what brought about this visit to the Mellon Bank which took place on April 25th.

A. The Mellon Bank was our lead bank, along with the Bankers Trust Company, and if we were to accomplish the financing we must initiate the discussions somewhere. We did in fact initiate them, requested the meeting, and held the meeting with the Mellon to review the ideas which we had in mind, and to give them a background on why we [fol. 15430] wished to acquire this equipment.

Q. What I would like to understand a little more clearly, Mr. Leslie, is whether this policy making group and the board had arrived at a definitive equipment program acquisition which you wanted to finance or was it a meeting that was arranged for the purpose of discussing with your lead bank the needs of TWA and arriving at what would be feasible.

In other words, what I am trying to understand is whether a decision had been reached as to what TWA wanted, and the question was merely how are we going to finance what we want, or was it a matter of discussing with your lending institutions what TWA's needs were, what its problems were, and seeing to what extent they would agree with the tentative conclusions, views, that the management of TWA held at the time.. Do you understand my distinction?

A. I do indeed. It was a definitive discussion. Conversations had been held with Lockheed, and there were specific offers made by Lockheed. The conclusion of the contract with Lockheed would have depended upon financing by TWA satisfactory to the seller, Lockheed.

These discussions were being held with the Mellon to attempt to conclude a credit agreement, or, let us say, to get the kite off the ground and the lawyers working on [fol. 15431] the development of an agreement and carrying forward of a definitive plan. It was not to discuss generally the equipment desires of the corporation.

I note here that Ted Rathman and Charlie Barker were both there, and I am reminded that their part in the scheme of things was to deal with this as their interest might appear.

Q. Who were they, those two gentlemen you have named?

A. Charles Barker was vice-president and treasurer and Ted Rathman assistant treasurer of Lockheed Aircraft.

Q. Prior to that time had you discussed with the Equitable this contemplated program?

A. I don't remember any specifics. I am reasonably sure that I had discussed—we had discussed the ideas that we had in mind, because it was the practice to see them quite often and keep the Equitable up to date, as a major creditor, with what we were doing and thinking.

Q. Prior to this visit to the Mellon Bank on April 25th or 26th had there been any discussions of any kind with the Tool Company looking toward the possibility of the Tool Company financing this acquisition rather than going to lending institutions?

A. I am sure there were no discussions with the Tool Company relating to the financing of this equipment at that [fol. 15432] time.

Q. Can you tell me who undertook to arrange this meeting at the Mellon Bank?

A. I imagine that I did.

Q. Did you invite these Lockheed representatives or did someone else?

A. I believe that I invited them.

Q. This was a two-day meeting, was it?

A. I can't remember that.

Q. Did you ask Mr. Cocke to join you?

A. Yes, I did.

Q. Was there any particular reason for asking Mr. Cocke to join you for this kind of a conference?

A. Yes, because he could speak authoritatively about the prospective traffic demand in the future.

Q. You mean he was more familiar than you were with respect to the underlying reasons for TWA's needs equipment-wise?

A. That's correct.

Q. Can you identify the persons who attended this meeting without reference to Mr. Cocke's diary?

A. Well, I think it would have been Mr. Ralph Euler, Mr. James Brown, of the Mellon Bank, Mr. Cocke, Mr. Leslie, of TWA, Mr. Barker, Mr. Rathman, of Lockheed. [fol. 15433] There might have been others from the Mellon Bank that were there, but Mr. Euler and Mr. Brown were those officers who concerned themselves most closely with TWA affairs.

Q. Will you describe as fully as you can the nature of the discussions which took place, giving us the substance of what was said by the various parties attending that meeting?

A. Well, the usual presentation would have been made, forecasts, financial forecasts, pro forma balance sheets, that we thought would arise out of the purchase and operation of that aircraft, and showing that it was a profitable thing for the company to do, and that the loan would be paid as due.

Q. Is that all you can tell us?

A. That would have been my contribution to it, and I can't remember even that very well, but certainly it couldn't have been anything else.

Q. Do you recall the substance of the presentation made by Mr. Cocke?

A. I don't recall it in any detail at all. He surely would have supported the figures which I would have produced in the forecasts on the revenue side, and elaborated more on them, because, indeed, they would have been derived from him.

Q. Do you recall the substance of what was said by [fol. 15434] representatives of the Mellon Bank?

A. I think they were duly impressed.

Q. I take it no representative of any other lending institution was present at that time, at those meetings?

A. I don't remember any. I don't believe there were.

Q. Do you recall what participation the Lockheed representatives had in those meetings?

A. They would have—I don't remember what part they took.

[fol. 15435] Q. Look at Defendants' Exhibit 216 now, Mr. Leslie, and let me go over some of the matters reflected by this document.

You notice that in the last paragraph on the first page it is stated:

> "TWA plans to arrange the proposed $10 million bank credit with only eight banks rather than with the fourteen Lockheed banks included in the present Constellation loan."

A. Yes.

Q. First of all, is that a correct statement of the facts, was that TWA's plan at that time?

A. It probably was.

Q. Can you explain how that came about, whose suggestion that was?

A. Well, I think the larger banks in TWA's credit felt that perhaps there were too many banks for too little in the way of TWA financing.

They had plenty of capital, and after all, you don't want groups too large, and so they decided they might cut it down.

Q. You mean the banks decided it ought to be cut down?

A. The banks, yes.

Q. You mean the Mellon, in effect, said it ought to be [fol. 15436] cut down?

A. Well, I am not privy to what conversations they might have had with their partners.

Q. Was that something which developed at the meeting itself, or did you go to the meeting with that understanding?

A. This is a piece of paper written by the Mellon Bank to itself.

Q. I understand that.

A. I don't know anything about it.

Q. This piece of paper, however, states that TWA plans to arrange the proposed $10 million loan, and I am inquiring now, Mr. Leslie, not as to what the piece of paper says, I am inquiring as to what TWA's plans were at that time. You understand the distinction?

A. I do indeed.

Q. I understand from your answer that, in effect, it was the banks who indicated that this $10 million credit should be limited to a participation of eight banks rather than fourteen?

A. That's what I tried to say.

Q. I just wanted to be sure I understood your testimony.

A. Yes.

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[fol. 15441] Q. Going back to what has been marked as Defendants' Exhibit 205, which relates to each financing by TWA, is this $13 million figure which appears on page 1 of Defendants' Exhibit 216 a figure which is included in these equipment mortgage notes that you have previously identified and testified about?

A. Yes.

Q. Going back to page 3, the statement there is that "Lockheed now guarantees the full amount of the present Constellation loan."

I don't recall any prior testimony on your part that in connection with those equipment mortgage notes Lockheed had given any guarantee. That is what I am trying to clarify at the moment.

A. I don't believe you asked the question.

[fol. 15442] Q. Previously I had asked you to identify and describe these equipment mortgage notes which TWA had issued, and since I was unaware of any guarantee by Lockheed, I did not ask you that question, Mr. Leslie.

Now I see a reference to a Lockheed guarantee, and I would like you to go back and explain the circumstances which led up to this Lockheed guarantee.

A. All right. I would like to read what I said in connection with this, if I may.

Mr. Barr: Your testimony?

The Witness: Yes.

Mr. Barr: Sure.

The Special Master: We will take a short recess, and then you can have an opportunity to examine that.

(Whereupon, a short recess was taken.)

By Mr. Davis:

Q. Mr. Leslie, can you explain this Lockheed guarantee question we asked you about before the recess?

A. I apparently failed to remember that a guarantee by Lockheed was involved in the previous financing that you mentioned, the 3 per cent notes of 1953, which apparently were in the original amount of $17,945,000, and show up here as paid down to $13,150,000.

[fol. 15443] Apparently it was a condition by the banks upon Lockheed that they guarantee that obligation to some extent, and I am reminded here that it was a total guarantee of the loan. This was a transaction between the banks and Lockheed to which TWA was not a party.

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[fol. 15446] By Mr. Davis:

Q. My question to you now, Mr. Leslie, is to explain what happened with respect to this Lockheed guarantee. By that I mean who negotiated it, when was the request made for it, how it became a part of the arrangement whereby TWA acquired some aircraft.

A. Well, now we are talking about the $17,945,000 credit.

Q. Yes, if that is the first time that it became involved. I want you to go back to the origin of this Lockheed guarantee, to the extent which you can.

A. The equipment notes—the 3 per cent equipment notes due 5/31/53, $17,945,000, were undertaken at a period of financial weakness of TWA, and as it also happens, of Lockheed.

It was almost necessary for Lockheed to sell the airplanes if it were not to go into bankruptcy and it was also, on [fol. 15447] the other side, necessary for TWA to have the airplanes if it were to stay out of bankruptcy.

It is also true that the bankers for TWA were also the bankers for Lockheed. So this was a rather difficult financing all the way around.

It was a bail out for Lockheed, a transfusion for TWA. The mastermind behind the evolvement of the plan was Ralph Euler of the Mellon Bank and Alex Ardrey of the Bankers Trust Company.

There was quite an involved negotiation to arrive here. I think I remarked to you that it was required that Curtiss Wright come in as a banker, and Wright Aeronautical, to help, to put their shoulders to the wheel, and one of the conditions incidental to this was that Lockheed, despite its poor credit, attach its name to TWA's paper to satisfy bankers who were lending their depositors' money.

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[fol. 15515] By Mr. Davis:

Q. Can you now identify or describe what the results or conclusions of those meetings or conferences were? I am referring to those which took place with the Mellon Bank on or about April 25th and 26th of 1949.

A. The airplanes then under consideration were in fact acquired, the credit in somewhat different totals, different manner, than set forth in the memorandum was concluded.

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[fol. 15521] Q. My first question, Mr. Leslie, is to identify and describe what was taking place between April 25th and 26th, 1949, and the approach to the Equitable referred to in Defendants' Exhibit 217, which may or may not have taken place on June 8th. I don't know.

A. I think that we went to the Equitable with the proposed financing to gain the Equitable's approval.

Q. Let me see if I understand you. In other words, following the meeting that you described as having taken place around April 25th and 26th a definite specific financing plan or arrangement with respect to those 749As was in fact developed?

A. Yes:

Q. Can you tell me approximately when, how, the parties involved in that plan reached a point of common understanding?

A. Some time later than this memorandum.

Q. In other words, you have no recollection of how soon after April 25th and 26th TWA and these lending banks and Lockheed and whoever else may have been involved [fol. 15522] tentatively agreed upon or reached some point of understanding with respect to how these 749s were to be financed?

A. Well, one has to say that basically and in the formal manner what was presented to the Equitable was what had been arrived at with the Mellon, as shown in 216.

Q. Will you describe what took place in connection with the approach that was made to the Equitable by TWA relative to what plan had developed with respect to the acquisition of the 749As?

A. I believe the problem was one of resolving differences between Equitable and the banks as distinguished from any, let us say, controversy with TWA in the matter.

Q. I don't understand what you mean by the differences between the Equitable and the banks.

A. On pages 1 and 2 you will see what the proposal was.

Q. Pages 1 and 2 of what, Defendants' Exhibit 217?

A. 217. And we also see that the Equitable had somewhat different views on the matter.

Q. First let me ask you this: There appears on Defendants' Exhibit 217 the sentence:

"The principal points of this proposal may be summarized as follows."

And then there appears to be a summary. Does that fairly [fol. 15523] and adequately and accurately describe the proposal which in fact was submitted by TWA to the Equitable?

A. I can only rely on what I see here.

Q. So far as you know that was the proposal submitted?

A. I believe that was the proposal submitted.

Q. Can you identify this so-called difference, can you tell me what the difference was, what the nature of the difference was?

A. I think the chief difference was that the banking group wanted cross collateralization and the Mellon didn't want to give that right up. I think that was the chief difference of view.

Q. I still don't fully understand your answer, Mr. Leslie. You say the banks wanted cross collateralization. What do you mean by that?

A. They wanted to have additional security in terms of a—not alone a first lien on this equipment, but a second lien on other equipment.

Q. Second lien, second to the Equitable's lien, you mean?

A. No, the Equitable had no lien. They had a general lien. They wanted to have a better position than the Equitable wanted them to have, and the right to cure a default by purchase of the specific credit, by picking it up. [fol. 15524] All this, in any event, I am not quoting from memory, I am quoting it from this memorandum itself.

Q. I am interested in or I would like to have the benefit of your understanding of what was taking place at that time, however you may be aided by this memorandum in explaining at least what your present understanding is of what was taking place at that time.

What you have been saying is not clear to me. Let me see if I understand you to this extent: Prior to the acquisition of these 749As is it correct that the situation was that the Equitable was the holder of some debentures, and did those debentures have or the holder of those debentures have a general lien—

A. No, there was no lien, there was no security, but—

Q. It was a general obligation of TWA?

A. A general obligation of TWA.

Q. The trust indenture relative to those debentures contained some provisions which under certain circumstances required TWA to obtain the approval of the Equitable?

A. Either that or, memory being what it is, side agreements that existed.

In any event, in connection with the Equitable financing, wherever contained, there was requirement of their approval.

[fol. 15525] Q. What side agreements are you referring to?

A. Well, wasn't there a three-party agreement at this time? Whatever it was, there was a restriction in what we could do which required us to obtain the approval of the Equitable for further borrowing, and I am not clear specifically what that was.

Q. Those were restrictions on TWA?

A. On TWA.

Q. What I am trying to understand is what it is that the Mellon Bank or the other banks either wanted to keep or wanted to get which the Equitable did not want to let them keep or let them get.

A. They wanted to be—

Mr. Barr: Excuse me. I have no objection to the substance of that question, but I would like to have it specified whether the witness has any recollection independent of this memorandum as to what the circumstances were.

Further, I would like to have the witness state whether this memorandum refreshes his recollection so that he now remembers.

The Special Master: Will you state first whether you have any such independent recollection?

The Witness: I have no independent recollection with- [fol. 15526] out the aid of this memorandum.

The Special Master: Does the memorandum refresh you?

The Witness: The memorandum does refresh my memory.

The Special Master: Now you may answer the question Mr. Davis asked.

A. The lack of a secured position on the part of the Equitable made them resist any strengthening of the banks' position against their unsecured position.

The banks at this time felt they wanted not alone the security of the aircraft being financed, but also a second lien on aircraft which they had previously financed specifically; and also, I believe, certain aircraft which had been financed by Equitable funds.

So they felt that their position was weakened by this in case of receivership and so on.

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[fol. 15563] Q. Can you tell me this, then, Mr. Leslie: On April 26th, or thereabouts, when you were discussing with the Mellon Bank the material that you previously have identified, and some of which is referred to in Defendants' Exhibit 216, was TWA interested in acquiring twelve 749s or a larger number of 749s?

A. TWA at that time was tailoring its request for financing to the maximum number that it believed would find favor with the banks.

My memory tells me that at that time we were interested, one might say, in as many airplanes as we could get, but that we had the view that twelve was—the amounts, the amount of borrowing involved, the willingness of the banks to advance it, met at about twelve airplanes.

Therefore, we limited our discussion with the banks to a, let us say, do-able number.

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[fol. 15570] Q. Is it correct that on that basis this banking group headed up by the Mellon Bank was prepared to finance twenty new aircraft?

A. I am not prepared to say that they were at that time, or—other than that the working up of a credit is, apparently in this case, and certainly in most others, a matter of negotiation, and the thing is fluid until it is done, and so I believe here that you started talking about a certain number of aircraft, the lending institutions found themselves willing to go further, less far.

Besides, you had a very imaginative banker who was working on this, Ralph Euler, whose mind never stayed quiet, and he could always seemingly think up some new curve, some new twist here.

Q. I note that Mr. Damon joined you in approaching the Equitable for their requested consent. Was that normal or usual, for the chief executive to accompany you when approaching the Equitable for such a consent?

A. It would not have been unprecedented. His going along would have been very appropriate.

[fol. 15571] Q. Do you recall what part Mr. Damon played in these discussions either with the banking group or with the Equitable?

A. Whatever meeting he appeared in he was the senior officer, and spoke completely and authoritatively, and when I was with him I would support him by the detail.

Q. My question to you, sir, was to describe the extent to which Mr. Damon had in fact participated in the discussions with the bank or the banking group for the development of this financing program.

A. I think Ralph's real place in the scheme of things was to sprinkle holy water on it.

Q. Can you describe a little more explicitly the part that Mr. Damon played in that connection?

A. Well, we were all of us working toward one end, and that was to acquire additional aircraft. My place in the scheme of things as chief financial officer was to attempt to develop these credits and induce the banks to go along in the necessary financing.

Ralph's place in the scheme of things was to endorse the overall plan of which I had the responsibility, if you like, for the detail.

Q. Can you explain, then, in the light of that explanation, Mr. Damon's participation in approaching the Equitable [fol. 15572] for the Equitable's consent?

A. I find it hard to state—

Q. Was he to sprinkle holy water on the Equitable?

A. After all, this is not—such a program—such programs as these are of substance, of size, and they are not entered into casually, and they were a matter of corporate hope and decision, and he, as the chief executive officer, was best qualified to talk about the benefits which might arise from the acquisition of the equipment. I could talk about the detail and the forecasts, whatever you like, but he had the greatest weight with either the Equitable or the banking group or individual bankers.

Q. The plan as developed up to that point, at least, did not involve any borrowing from the Equitable, did it?

A. It required the approval of the Equitable.

Q. And Mr. Damon joined you to lend weight to the effort of TWA to obtain that approval, is that—

A. This would be his role, yes.

Q. Do you recall whether or not at that time you had met some resistance from the Equitable to this financing program?

A. I don't believe that we had.

Q. Now look at the item entitled "Guaranty of net worth," which reads:

> [fol. 15573] "Hughes Tool Company to guaranty that TWA's net worth would increase by $10 million in the nine month period ended December 31, 1959."

Would you explain that part of the program?

A. I believe that TWA had submitted forecasts which indicated that we would achieve certain levels of earnings, which, of course, without the payment of dividends, would serve to increase net worth.

Exactly what those figures were, I don't recall. But certainly they were asking the Tool Company to stand behind TWA's forecasts to some extent.

Whether this was a hundred per cent, I don't recall.

Q. Who suggested such a guarantee?

A. This emanated from—well, again, all one can say is that I am weak on the genesis of this newer, later proposal than this one of April the 26th, and I have to answer as I see it here, that—a very vague memory on it—that it was the intent of the banking group to require the Tool Company to stand behind the forecast that TWA was making of what it would do earnings-wise.

Q. I am trying to identify at this point, Mr. Leslie, where that suggestion emanated from.

A. It emanated from the banks. They were the ones that [fol. 15574] were requiring this.

Q. Was there any discussion with Mr. Hughes or the Hughes Tool Company as a result of such a suggestion?

A. At this point I would argue that the position was fluid, that the banks had given some indication of what they would require, the next thing was would the Equitable go along with it. There was no—

Q. I understand that. I am trying at this point to determine whether or not you or anyone else that you know of approached Mr. Hughes or the Hughes Tool Company to see if he would go along. I have in mind reference in Mr. Cocke's diary to communication with Mr. Hughes relating to equipment, I have in mind your reference to discussions or communications you may have had with Mr. Hughes. My question at this time, however, is simply whether or not you know or have any knowledge as to whether TWA, following the suggestion emanated from these banking institutions, took the subject up with Mr. Hughes or the Hughes Tool Company or whether you went to the Equitable without going to the Hughes Tool Company.

A. So far as my memory serves me at all on this, I would say we had not gone to the Hughes Tool Company with—as to whether—we had not gone to the Hughes Tool Company [fol. 15575] with the question as to whether they would guarantee, not at that point.

Q. Look at the next paragraph, which states:

> "After discussion of the above proposal with Mr. Parkinson and Mr. Shailer, Mr. Dow advised the company that the Society would consider approval of the proposal provided that $2,500,000 debenture 3s due 1956 would be redeemed concurrently with issuance of the proposed 3 per cent notes."

First I would like to ask you whether or not you have any recollection or knowledge or information as to a discussion of this financing proposal with either Mr. Parkinson or Mr. Shailer.

A. I have no knowledge of discussion with Parkinson or Shailer.

Q. You did not?

A. I did not, no.

Q. Do you know or have you ever been told whether Mr. Damon did?

A. I do not know.

Q. Do you know whether or not there was any communication of any kind between either of those gentlemen and the Hughes Tool Company or Mr. Hughes?

A. I don't know.

[fol. 15576] Q. That states, as I understand it, that Mr. Dow advised TWA that the Equitable would consider approval of the proposal under certain conditions, there described.

Do you recall TWA receiving that advice?

A. Are you referring now to the paragraph "Today, in a meeting with Mr. Leslie," et cetera?

Q. No, I am referring to the portion of the paragraph under "Guaranty of net worth" which reads:

> "Mr. Dow advised the company that the Society would consider approval of the proposal provided that $2,500,000 debenture 3s due 1956 would be redeemed concurrently with issuance of the proposed 3 per cent notes."

A. I believe that this was done in a completely informal manner, that there was a telephone call, and it was undoubtedly a telephone call to me.

Q. The next sentence says:

> "He also indicated that the Society would consider participation in the proposed financing to the extent of $5,000,000."

Do you recall that?

A. I believe that there was an indication that they would be willing to join the banking group.

Q. The $2,500,000 debenture 3s due 1956 referred to, re- [fol. 15577] lated to, a portion of the debentures held by the Equitable?

A. That's correct.

Q. Isn't it a fact that in essence the Equitable, Mr. Dow, called you and said that if $2,500,000 of the outstanding debentures were redeemed they would approve the proposal, provided that they also had an opportunity to participate in the new financing to the extent of $5,000,000?

Mr. Barr: Object to the form of the question.

Q. Isn't that the substance of what happened?

Mr. Barr: Object to the form of the question. It is argumentative. The witness has testified what happened.

The Special Master: Overruled. You may answer.

A. I believe that Dow indicated that they would like to take a part of the credit, would be willing to take a part of the credit.

Q. Didn't he, in effect, intimate or indicate to you that that was part of the package that would be interesting to them, otherwise they would not give any approval?

Mr. Barr: I object to the form of the question. It is argumentative. The witness has answered it twice now.

Mr. Davis: Let's not be afraid of the facts.

[fol. 15578] Mr. Barr: I am not afraid of them at all, Mr. Davis.

The Special Master: I will sustain the objection.

Q. Look at the next paragraph, Mr. Leslie:

> "Subsequently, the company notified Mr. Dow that the proposed redemption of debenture 3s would not be acceptable to the Mellon which would prefer to have the bank group take the entire amount of the financing."

Do you recall discussing that with the Mellon group or discussing the suggestion of Mr. Dow with the Mellon group and reporting back to Mr. Dow as to the views of the Mellon group?

A. I think that the Equitable had indicated that they would like to see some of their debentures paid off if this financing was going to be done, and not as a condition to their agreement that they would be willing to become a part of the—take up $5,000,000 in the bank credit.

* * * * * * *

[fol. 15601] Q. Mr. Leslie, what I am trying to get you to do is to pick up where you, in effect, left off, the status of things on or about June 8, 1949, which, as I understand it, was that as a result of the discussions that were taking place involving the Equitable, you, the Mellon Bank—

[fol. 15602] A. That's right.

Q. (Continuing)—the Mellon Bank turned down the last alternative proposal of the Equitable, and that seemed to have disposed of a financing program for twenty Lockheeds. You still have the discussions of April with the Mellon Bank relative to twelve Lockheeds. Now I find you with a contract for thirteen Lockheeds plus options for an unlimited number.

I am trying to find out what happened, since you were the principal officer of TWA, with the assistance of Mr. West, and the assistance of Mr. Rummel, insofar as the technical aspects of the airplane were concerned, having brought about these negotiations, with a commendation from the Board.

Can you tell me what you did and what you accomplished after whatever happened on June 8, 1949?

A. After June 8, 1949?

Q. Yes, that's right, after the proposal for the financing of twenty, as I understand it, you weren't able to bring the Equitable and the banks together on that proposal, isn't that correct?

A. This is right, this is right.

Q. Now what did you do?

A. If we took a photograph at that time, that is just [fol. 15603] where it stood then. But let's not give up hope. There were continuous discussions and negotiations going on which are only kind of brought to light by things like this.

Q. Thinks like what?

A. Like this piece of paper we are dealing with here. This doesn't mean anything definitive or conclusive. We did buy airplanes. This is just a red light, a stopping point at a given time. Somebody wrote a memorandum on where it was then. We were negotiating a credit. This is not a thing you pick off the shelf. So there we are. We carried on with it, and we finally bought the airplanes.

[fol. 15604] Q. What I want you to do is to describe to me what you did in carrying on whatever efforts were being made, that's all.

A. Well, the specifics, again, I must say I can't go—warrant for it. I will make a comment here that I think this, and my memory tells me, I will be challenged in the next go-around on my memory here, and all I can say to you is that we were in fact negotiating an aircraft contract on the one hand with Lockheed, who was an extremely eager seller, they had a standard type of contract which we were insistent that we were going to improve upon, we had bankers who in their desire to help out Mr. Lockheed through the same of aircraft were in fact quite eager to loan money, we had an Equitable who had a very substantial interest in the success of the carrier, and these things were all—things we discuss here were normal matters of conciliation, just getting one man to see the other fellow's view a little bit better, and finally we arrive at a purchase and a financing, and there you are.

The script would be the same on this one as it was in one —another credit three or four years later. You are asking me what I did for a living.

Q. Was it always TWA's objective to try to finance twenty aircraft, and you started with discussing the acqui- [fol. 15605] sition of twelve with the Mellon Bank in April 1949, and then—

A. This is what the record shows.

Q. Yes, but I am interested in what you remember as to what occurred, Mr. Leslie.

A. I believe, and I am being repetitious, that we measured up what we thought we could do with the banks, and remember, there are telephones available, we could gain a view on what might be agreeable for discussion by our banks by picking up a telephone, and we initially measured the size of what we could do in terms of twelve airplanes.

It later improved somewhat. There we are. We wished to have more than—twelve was not the, generally speaking —well, generally speaking, or appetite was unlimited for airplanes, and what we did get was measured by—our desire was measured by our demand factor, that is, how much credit we could get. There we are.

The variance in the number of airplanes is not a matter of particular importance.

Q. Let me put the question to you this way then: When you reached this impasse, even if a temporary impasse, relative to the financing of twenty aircraft, is that when you successfully negotiated a deal with Lockheed for a firm contract for thirteen aircraft and options on more—

[fol. 15606] A. We had no problem on negotiating a contract with Lockheed. For Christ sake, they were fairly—they were practically bankrupt for inability to sell aircraft. There was no problem there. What we were getting out of Lockheed was the last drop of blood.

Q. What you are saying, in effect, as I understand it, is that the number of aircraft you were able to get from Lockheed depended upon what you were able to negotiate in financing?

A. That's correct, yes.

Q. Depending on a larger financing program, you went ahead, on or about June 24th, placing a firm order with Lockheed for thirteen, and obtained some contractural rights for more, such an option to be exercised if you worked out the financing—is that the substance?

A. That is a fair statement, which I accept. In the case of a purchase agreement I might say to you or point out to you that as a fairly important part of that was always a paragraph, and you can go to LD-60, or any others that you wish, and you will note it says this is a contract subject to financing terms satisfactory to the seller. So we—

Q. The seller being the manufacturer of the aircraft?

A. Yes. So that what we were talking about here was a [fol. 15607] contract which was only a contract insofar as we had financing arranged.

It could be signed and witnessed and everything else, but it wasn't a contract until, in fact, we had arranged the financing, and that was satisfactory to Lockheed. So the two were tied together.

Q. I am interested in that portion of the minutes which state:

> "It was contemplated that efforts to obtain mutually agreeable financing would proceed for twenty airplanes, i.e., as though this corporation had exercised the option provided by letter agreement SL/41901 for the maximum of seven additional airplanes. The meeting was advised that the financing discussions in progress contemplated twenty airplanes, and that upon successful consummation of such financing arrangements, it would appear appropriate to increase the number of airplanes covered by contract No. LD-60 from thirteen to twenty, or to whatever number between thirteen and twenty might be consistent with the financing arrangements."

What I am trying to understand, Mr. Leslie, is what financing discussions were then in progress, and what was the nature of those financing discussions, and who was in- [fol. 15608] volved in them.

A. TWA was attempting to financing a block of airplanes, with the desire to have as many as twenty, and failing that, as many as it could finance, and discussions were then in progress with our lead banks, and tapping the Equitable view as necessary, these discussions were going on.

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[fol. 15620] By Mr. Davis:

Q. Can you describe more fully than you have what took place in connection with the arrangement for this financing? [fol. 15621] A. I would say only that the Defendants' Exhibit 218 appears to be a correct reasonable summary of what happened, of the credit agreement which was finally concluded.

Q. Mr. Leslie, I am not interested at this juncture in the summarization of the financing agreements which were eventually entered into, except to the extent to which you care to identify what the nature or substance was of what you negotiated. What I am interested in finding out, Mr. Leslie, is what events, discussions, took place which led up to this financing arrangement. I would like to understand a little more fully these meetings, what took place at those meetings and discussions that you had with the Equitable, meetings and discussions which you may have had with the banks, the Mellon Bank or the Bankers Trust Company, as lead banks in this financing, discussions or meetings or objectives that developed at TWA, or any that you may have had with the Hughes Tool Company or Mr. Hughes.

In other words, what I am trying to find out, and I am trying to refresh your recollection, Mr. Leslie, have you tell us, is what developed and how TWA went about its efforts to obtain the number of 749As that it wanted or needed, and how it arranged the financing it obtained. Do you follow—

[fol. 15622] A. I hear you loud and clear.

Q. Now let's see what you can tell us.

A. And I have to say again that there were many discussions that were involved leading up to the final conclusion of both LD-60, the contract with Lockheed, Lockheed Domestic No. 60, and the credit agreement, and they were inextricably woven together because of the requirements that were made upon Lockheed by the banks in connection with the credit, and I find it impossible to other than say that the negotiations and bargainings were no different than is a part of—was a part of any of the other negotiations which we had in TWA, and generally speaking, I think one of the reaesons that my memory is poor is they were conducted in a sense of urgency, a forced draft, and—it's like answering what did you do two weeks ago in the afternoon. I don't know.

Q. Can you identify and describe this sense of urgency, what were the circumstances or causes for that feeling?

A. I believe the sense of urgency is associated with, one, the passage of ability of Lockheed to deliver airplanes on the times called for in their contract, or at least the assertion that they would be unable to meet dates constitutes one area of, let us say, urgency, the banks, on their part, indicating we must get this done, we must get approvals, [fol. 15623] we must get our credit agreement.

Once you enter into or set out to enter into a contract of substance, I know that you would have a sense of urgency. Perhaps the phrase is a poor one.

Q. Can you describe the manner of the impasse which you have described, or the difference of opinion, if you prefer to call it that, between the position or attitude taken by the commercial banks and the Equitable? How was that resolved?

A. I think it was basically resolved in favor of the Equitable's requirement.

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[fol. 15625] Q. Look at Defendants' Exhibit 218. You see a statement under the heading "General" which reads:

"The banks are to have the right of first refusal of any additional debt financing proposed by the company."

What does that mean?

A. This would be a substitute for a call premium on—substitute for a call premium on the payment of the notes.

Q. Can you explain that a little more fully? I think I understand what you are saying, Mr. Leslie, but the record may not adequately reflect the thought that you are trying to convey.

A. The feeling of the banks was that they—the bank group—was that they had spent a great deal of time, energy, consideration, on the TWA problem, and that if there were a call made by TWA it would—they should have the right [fol. 15626] to—first right—first refusal for a 20 day period.

Now, along with this was the—paralleling this was the view of the banks that it was at the same time highly desirable for TWA to be allowed to pay off its debt or that any borrower be allowed to pay off its debt as it was able to do so, and not have to pay a premium.

So there would be two ways in which one—there would be two ways in which one could insure that the borrowings would stay with that bank group if they continued to feel they wished a loan. One would be to impose a premium which would make it unprofitable for the loan to be called and refinanced, or to be paid off out of cash funds, and the other would be to give a right of first refusal where they had the ability, if you like, to sort of bid against another group that might be conceivably brought in. This was a matter of some discussion at the time, and I remember it very vaguely.

Q. Let me refer you to Section 4.05 of the credit agreement that was actually entered into, and I note there:

> "TWA agrees that it will not enter into any mortgage, pledge, conditional sale agreement, retention of title, or lease with respect to aircraft, flight equipment or accessories to aircraft and flight equipment permitted by the [fol. 15627] terms of Section 2.14 (g) (18) of the 1949 chattel mortgage or will not borrow any money . . ." etcetera.

The thing that I am interested in, apart from your description of this giving of a right of first refusal, is the provision or the agreement by TWA relating to a mortgage lien, conditional sales lease, with respect to aircraft or flight equipment.

Can you tell me how that developed, and who suggested such a provision?

A. Are you restricting consideration here, when you ask me the question, of that part, without tying it into the right of first refusal?

Q. Yes.

A. It is impossible to separate, in my view, since you are asking me the question.

Q. Did you have any discussion with the Equitable about this suggestion of giving the banks a right of first refusal?

A. I must have.

Q. Can you tell me what you recall about what you must have done?

A. I don't recall the specifics.

Q. Was there some trading that took place, did the [fol. 15628] Equitable want something to balance the scales, so to speak?

A. My poor memory on the subject was that the Equitable wished to have the right to pick up the secured—to pick up the notes, the secured notes, that came ahead of them in case of default or impending default, and this was ultimately reflected in the fifth supplemental indenture.

Q. Yes, but I am unable to find in the supplemental indenture the limitation that the Equitable could acquire those notes only in the event of default or in pending default, and I am trying to discover what the discussions and negotiations were, if that was all that the Equitable had in mind.

A. Well, they negotiated better than they knew. They negotiated somewhat better than they intended, if you want to put it that way. They put in a condition which was that they would pick up both series of notes—

Q. What I don't follow, Mr. Leslie, is this: There were the banks who first had refused giving the Equitable an opportunity to participate by taking $5 million worth of this financing, and the same banks apparently are interested in protecting their work and effort, as you describe it, by asking for a right of first refusal, and at the same time, apparently, insofar as the documents reflect, anyway, the [fol. 15629] Equitable obtained an unlimited right to buy out the banks at any time, principal and accrued interest, no premium, and the thing doesn't seem to fit to me.

I am sure it must have, as you say. But can you explain a little more fully how these various points of view were being brought together; and how the trading took place?

Mr. Hupper: Let me just state on the record that I don't necessarily accept Mr. Davis' characterization of the Equitable's rights under the documents. The documents speak for themselves. There should be nothing in the way this examination is conducted that would indicate that either I or the witness accept the characterization.

Mr. Davis: I will so stipulate, that the agreement speaks for itself, and means whatever it means. But at the moment I am interested in the nature of the negotiations which were taking place rather than interpreting the agreement.

A. Well, we can repeat it in any different form that we wish, but my poor memory on the matter was that the Equitable wished to have the right to protect themselves in case of default by buying up the secured notes.

[fol. 15630] Q. And the banks wished to protect themselves against losing their investment in the notes by a refunding which from their point of view would buy them out of their present then existing position without a premium.

Is that the trade that was made, if the Equitable was to have the right to purchase the notes the banks wanted first refusal, is that the way the thing traded itself out?

A. No, I don't believe there was any particular concern on the part of the Equitable as to that provision in the credit agreement. It appeared reasonable to me then, relating to that condition, that as a practical matter we were better off with that condition than we were with a call premium, because of the prominence of the banks with whom we dealt, and the improbability that another group could better significantly what these banks were undoubtedly willing to do without pressure.

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[fol. 15632] Q. Will you explain or describe what negotiations, if any, took place with the Equitable relative to the second proviso reflected in Defendants' Exhibit 218, namely that:

"The company obligates itself to secure the debenture 3s by mortgage on its presently owned Constellation fleet and the proposed 20 new Constellations as soon as the secured bank indebtedness is paid off"?

A. I believe this was a condition which was readily agreed to by TWA. It didn't harm our credit position, and improved theirs. There was no particular contest.

Q. I am not sure that I follow the reasoning process [fol. 15633] you went through to reach that conclusion, Mr. Leslie.

Let me ask you whether or not that aspect was discussed internally at TWA.

A. I am sure that it was. I am sure too that my view on it was relied upon to a very large extent.

Q. Did someone—

A. If I made the observation that I thought it was a reasonable condition, it would have been accepted.

Q. Didn't someone, in the course of those discussions, indicate that TWA could reasonably contemplate some future financing problems for the acquisition of additional aircraft?

A. Yes, and I didn't take it that this was a barrier, this condition was a barrier to future financing.

Q. I understand, but is the existence of a mortgage on your existing fleet—let me put it differently.

This refers to what is to take place after the current indebtedness was paid off?

A. That's correct.

Q. The current indebtedness to the bank?

A. That's correct.

Q. Would it have facilitated, at least in planning, future financing if you could have been in a position of having a fleet free and clear of any lien or mortgage?

[fol. 15634] Mr. Hupper: I object to the form of the question. It calls for a conclusion of the witness, speculation of the most—

Mr. Davis: I am asking whether or not at TWA, internally at TWA, anyone advanced that argument, if you please, for the purpose of developing a position with the Equitable.

Mr. Hupper: I have no objection to that question. You should have asked it in the first place.

Mr. Davis: I thought I had.

[fol. 15635] A. I believe the discussion would have been a communing with myself on the matter, whereas the Board would have relied upon my view as to whether or not it was a condition which would harm us in the future, and I did not so conclude.

Q. I understood that from your prior answer.

A. If you want the reason, I will give that.

Q. Please do.

A. It was that certainly the borrower, in as large a degree as TWA was, and, incidentally, is, is the ham in the sandwich.

Q. I beg your pardon?

A. The ham in the sandwich.

Q. Who was the ham?

A. TWA.

Q. I see.

A. And if the banks—one or the other—one, on the one side, the banks, in future financing, would have desired to cross collateralize anything which they—any new credit by a lien on the free and clear equipment, whether they needed it or not—I doubt that we could have worked out any better credit terms if this was open for them to do—as distinguished from the Equitable tying itself to this remainder lien.

[fol. 15636] Q. I am sure that I don't understand your reason any better than I understood your conclusion, Mr. Leslie. Do you think you could explain that a little further by comparing the position of TWA, be it the ham in the sandwich or not, the position of TWA insofar as freedom of action in connection with future financing if the Equitable had not obtained that kind of an agreement versus the position of TWA with it?

A. Well, one must measure these things in his mind, and what I have told you was my conclusion on the matter, and while it might have been an improper one, a naive one, nevertheless, it was my own, and I felt it was no great harm to TWA, or any harm at all, and the banks had no interest in the matter after they were paid off, that is, our bank group, and so there you were.

Q. But the banks, if they were paid off, were interested in the right of first refusal for new moneys, and at this point all of the property would have been mortgaged to the Equitable. Nobody raised that as a little bit of a problem?

A. As I say, the—I was relied upon as to whether this was an onerous condition, and I had the view that it was not, and there we are.

Q. Would it be fair to say that since you were in the [fol. 15637] bag to the Equitable it didn't make any difference how much more they took?

Mr. Hupper: I object to the form of the question.

The Special Master: Sustained.

Mr. Hupper: On the ground that it is argumentative, calls for opinion and conclusion.

Mr. Zeller: Off the record.

(Discussion off the record.)

Mr. Leslie, I am now particularly interested as to whether or not there was any discussion of that aspect. I am referring now to the possible burden or controlling position that this arrangement might have put these lending institutions in.

Was that aspect of it discussed, you or Mr. Damon, any member of the Board, Mr. Dietrich, Mr. Hughes, or anyone in a senior or executive position?

Mr. Hupper: Are you through with the question? If you are, I would like to have it read back, and make sure I understand it.

The Special Master: Read the question, Mr. Reporter.

(The question was read.)

Mr. Hupper: I object to the form of the question on the [fol. 15638] ground that it assumes facts not in evidence, that there was any burdensome aspect at all to this condition. The witness has already testified to the contrary.

The Special Master: I don't accept that last statement. I think you disregard the ham in the sandwich testimony when you say that the witness says there was no burden to it.

I got the impression from the witness' testimony that he was between the bankers and the Equitable, that is, TWA was the ham, and therefore he made the best deal he could, and he didn't think this was a onerous burden in view of those circumstances.

Mr. Hupper: He testified there was no harm to TWA at all. Those were his very words.

Mr. Davis: Whether there was any harm or not, may I point out that what I am interested in is whether or not the aspect which I am referring to, being the right of the bank to a first refusal, placing a mortgage on all of their flight equipment upon the paying off of this bank debt, and the position of the Equitable as a result of this financing, and the problems which might develop as a result of that position in connection with future financing, the provision [fol. 15639] which precluded the placing of a lien or mortgage on flight equipment without the consent of the banks, even for a twenty day period—was that aspect of what the witness describes as something which he didn't feel he should object to or did not object to discussed.

Mr. Hupper: Mr. Special Master, the question has now been expanded from one aspect, the question of the Equitable's condition No. 2, to a number of other aspects, I think five in number; the right of first refusal, the provision as to no borrowing, et cetera, et cetera.

Mr. Davis, as I listened to him, enumerated five different elements, and lumped those all into one aspect.

That is a different question, and it seems to me it ought to be broken down into its component parts.

The Special Master: I think that is right, Mr. Davis.

Mr. Davis: I will be glad to do so, but I don't know what was discussed, and the discussion may not have been directed to one of these various matters which I referred to, which I gave merely as examples.

The aspect of the discussion I am seeking to discover, [fol. 15640] whether or not it took place, is whether or not there was a discussion as to how this financing left TWA insofar as future financing was concerned—that, to my mind, is one aspect—were there hands being tied by any of these provisions.

I don't care which one was referred to in the discussion. What I enumerated were examples of what appears to me, and I believe would appear to any reasonable person familiar with these kind of transactions, as tying up aspects.

Whether they are considered that way or not by the advocate for the Equitable or by the Court is a matter that we will determine when we reach that issue.

I am afraid that if I ask this witness to address himself to the minutiae of the arrangements that took place he will have no recollection of any discussion with respect to that particular provision.

What I am interested in, I don't know what provision any member of the Board or Mr. Damon might have considered to be onerous.

The Special Master: I will permit you to ask if there were any discussions about these various tie-in clauses, if that is the way you want to describe them, and let the [fol. 15641] witness answer yes or no.

By Mr. Davis:

Q. Will you please do that?

A. There were discussions of the credit agreement and its clauses which were restrictive.

Q. Can you identify those who participated in those discussions?

A. Certainly I would have discussed this with Mr. Damon, he would have relied upon my view of the matter, I would have discussed it with the Board of Directors, or explained it to the Board of Directors, and made the recommendation that we should accept those conditions as not being unduly restrictive or, let us say, unfair to the corporation.

Q. I fully understand your recommendation, Mr. Leslie. What I am trying to find out now is what the others said, whether or not they expressed any view that these provisions were unnecessarily restrictive or could develop as burdensome, depending upon what might happen in the future, that kind of thing.

I am trying to get you to describe to me what Mr. Damon or anybody else may have expressed to you.

Mr. Hupper: Could I just raise a point of inquiry? I'm sorry, Mr. Leslie, to interrupt. The witness spoke of [fol. 15642] the credit agreement, and I take it he is referring to the provisions of Exhibit 220.

Mr. Davis: One agreement is with the Equitable, Exhibit 219.

Mr. Hupper: He spoke of the credit agreement.

The Witness: Well, I think that what I was referring to is that series of agreements that were tied together.

Mr. Hupper: Fine, sir. I just wanted to be sure that the record would show it.

A. Certainly I—I become repetitive—I reviewed the deal, if you like, that we had arrived at, and gave my opinion that it was a reasonable thing for TWA to undertake.

I know that there were—I know there must have been questions, and certainly there were questions, and I was required to report in detail to the Board at the time.

A creditor's lot is not an easy one when you are borrowing considerable amounts of money.

Certainly the Equitable anticipated at one time that when it was loaning $40 million that—on an unsecured basis—the future financing would be undertaken in the same manner, and in such case they needed no protection or security.

[fol. 15643] In fact, the course of financing changed, and there was secured debt incurred for the purchase of equipment.

In the light of this, they imposed the condition that they not be placed in a disadvantageous position in the future.

This they secured to themselves by the right to cure a default by purchase of secured debt, and two, by having an automatic security with the running out of the then secured credits.

So that was that side on the Equitable. It didn't appear to be anything which was unsupportable from TWA's part in that.

In the case of the banks, I have already stated that the view that a borrower should in fact be encouraged to pay off his debt, and without a premium, was sound banking, and certainly acceptable to the borrower.

Their right of first refusal for twenty days did not appear to impose an impossible situation on TWA, considering the freedom of action you had to attempt to negotiate outside that group and the luster of the group itself.

So my conclusion at the time was that this was satisfactory since we were a borrower without very much bar-[fol. 15644] gaining power.

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[fol. 15646] By Mr. Davis:

Q. Mr. Leslie, referring to your last answer before the recess, you indicated, as I recall it, that the Equitable [fol. 15647] originally had advanced moneys to TWA on an unsecured basis, and with the expectation that future financing by TWA would be carried out on a similar basis. Am I correct in understanding what you said so far?

A. Perhaps I should say that this was my view of what they believed they were doing.

Q. Based upon your interpretation of whatever statements or discussions you had from them from time to time?

A. That's right.

Q. In other words, you didn't go into a closet and develop the views of the Equitable, did you?

A. No.

Q. I note also that in 1948 there was a substantial amount of equipment mortgage notes issued by TWA, namely, to this banking group, which were a lien on equipment. Isn't that right?

A. That is correct.

Q. At that time was there any discussion with the Equitable indicating that this financing for new equipment with a lien on equipment was not putting them on an equal footing, or anything of the like, anything like that develop in connection with that financing?

A. I don't believe they made any assertions at that time as to a requirement for collateralizing their loans.

[fol. 15648] Q. I am trying to understand how this subject came up by the Equitable a year later, 1949, why was the bank loan then contemplated so different from what had taken place in 1948.

Mr. Hupper: I object to that as argumentative, and an attempt to speculate as to what the thoughts of the Equitable might have been on the subject.

If he were to ask what the Equitable said, if they said anything, as to it being different, I would have no objection.

Q. What I want is your understanding of the Equitable position, Mr. Leslie, based upon whatever they told you or however they said it, because I understand that ideas may be conveyed and expressed by lending institutions in various ways.

The Special Master: I will overrule the objection to the question as now amended.

The Witness: Would you read the question?

(The record was read.)

A. I believe there was a simple statement on the part of the Equitable that they desired this for their further protection, and there we were.

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[fol. 15660] Q. Let me refer you to what has been marked as Defendants' Exhibit 222, which is entitled "Hughes Tool Company Agreement."

You see the last whereas clause, which reads:

"The lending banks, Lockheed and Equitable, respectively, require the execution and delivery by Hughes of this [fol. 15661] agreement as a condition to their respective commitments under one or more of the agreements above mentioned, and Hughes deems it in its best interests and in furtherance of its corporate purposes and appropriate in the exercise of its corporate procedures to comply with such requirements and to execute this agreement."

Then the covenant that I find, Mr. Leslie, is one which reads:

"Hughes covenants and agrees with each of the other parties hereto that if the net worth of TWA, as of December 31, 1949, is not $19,246,000 or more, Hughes will on or before June 30, 1950 cause the net worth of TWA to be increased by means other than the realization of net profits from operations and capital gains by an amount equal to the difference between such net worth of TWA as of December 31, 1949 and $19,246,000."

I would like to understand how this agreement came about.

Mr. Hupper: Could I inquire, is that a question?

Mr. Davis: Yes.

Q. I would like to understand that, Mr. Leslie, by asking you to describe as fully as you can the events which brought this agreement about.

A. I believe the genesis of Hughes involvement in this [fol. 15662] financing, requirements upon them, was from the discussions with the banks, and undoubtedly arose from the presentation of forecasts at the time to them in which TWA asserted that it would have a net worth at the year end of a given amount, and a feeling on the part of the banks that the Tool Company should underwrite the validity of the forecasts or forecast, and then that demand was later joined in by the Equitable in the final documents, and rather unnecessary that the Tool Company commit to the Equitable as well, but there it was, if it will add anything to it.

Q. Can you identify or describe the extent to which the Tool Company participated in discussions with the lending banks which brought about this result?

A. I am not clear. My memory is poor on this. It would not have been a matter of any great concern to me what was imposed upon the Tool Company in connection with this.

Q. I appreciate that.

A. And therefore my memory is—it's not memorable.

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[fol. 15672] By Mr. Davis:

Q. Let me refer you to Defendants' Exhibit 142, which is a memorandum from Mr. Koepnick under date of June 23, 1949, which states that:

"Prior to the final decision to purchase the twenty 749A airplanes on contract LD-60, extensive studies were made of other available equipment. In the final analysis five different plans were considered as follows," and then the plans are described. Do you recall the consideration being given by TWA to acquire some equipment other than the twenty 749As?

A. My impression was that Douglas equipment was considered at that time, and the decision fell in favor of the [fol. 15673] Lockheed aircraft.

Q. You note at the bottom of that same exhibit the statement appears that:

"These various plans were thoroughly investigated and consideration was given to cost of acquisition, cost of provisioning, cost of personnel training, increased personnel requirements, effect on cash position and revenue earned."

Did you or your department participate in this investigation and consideration?

A. No. I believe those studies were conducted by the then engineering department, and the only ones that I—the only forecasts, if you like, that I dealt with were where the decision had been made to pursue the Constellation aircraft route, Constellation aircraft route.

Q. Let me ask you this: Was this alternative equipment something which was discussed with the lending institutions, or were any of these other plans?

A. I am sure that the availability of other aircraft—the availability of aircraft generally was discussed with the banks.

Q. These various plans which are set forth, were those discussed as various plans?

A. I would not assert that in that manner. I am sure [fol. 15674] that the decision to purchase the Constellations rather than other aircraft or any aircraft at all was a matter of discussion with the financing institutions.

But I could not narrow it to Plan 1, Plan 2.

Q. Can you identify or describe the nature of those discussions with the lending institutions?

Mr. Barr: For the record, could we have some specification of which lending institutions you are talking about?

Mr. Davis: The ones he was having discussions with with respect to the acquisition of equipment and the financing thereof.

Mr. Barr: All of them?

Mr. Davis: All or any one of them.

A. Am I being asked a question?

Q. Yes.

Mr. Davis: Read the last question I had to the witness, please.

(The question was read.)

A. I can't describe the nature of them, I can't describe the detailed nature of them, those discussions, other than to say that I am sure they were discussed.

Q. Can you identify or describe how the decision was reached to pursue the Lockheed aircraft rather than the [fol. 15675] other types of aircraft referred to in Defendants' Exhibit 142?

A. I believe that statistical material was developed comparing the two aircraft, really, that were involved, the Constellation or, alternatively, the DC-6 aircraft, and consideration given of the availability of the aircraft, what other—what our competition had been doing by way of aircraft purchases, and broad considerations were reviewed, but not anything, my memory recalls, relative to this memorandum, for example.

Q. Is that all of the information or knowledge that you have with respect to what took place relative to the decision to acquire the 749As rather than some Douglas DC-6s or a combination of DC-6s and Lockheeds?

A. Well, I think one should keep in mind that the then president, Damon, was very well versed in these matters, and, in fact, had been an aircraft manufacturer himself, besides being the president of another air carrier just previous to being president of TWA, and that he had conversations with his chief engineer, and that he had decided opinions on his own account on equipment.

So that the decision, I would say was made more by Damon than a roundtable discussion of lesser lights and those with less knowledge of aircraft capabilities and eco- [fol. 15676] nomics.

Q. Let me ask you this question: Did the availability of financing with respect to the Lockheeds have any effect or influence on the decision, so far as you know?

A. This—in my opinion, availability of financing would have been the same in either instance, whether we had agreed upon the Douglas DC-6 or the Lockheed Constellation. There wasn't any difference there.

Q. It was my understanding from your prior testimony that Lockheed itself had played a part in making financing available—

A. Had been required by the banks to extend a guarantee of TWA's obligations.

Q. Had Douglas indicated a similar willingness to assist in connection with whatever financing problem TWA was trying to solve?

A. I don't believe that Douglas had been approached, let us say, officially on the matter.

Q. What do you mean by officially? Were they approached unofficially?

A. Put it this way: Salesmen were knocking at the door all the time, so that what they were able to do by way of deliveries, what the price of the airplane was, and the specifications, were known by virtue of the seller insisting [fol. 15677] that you be made aware of this, so that what I am saying is that there were no negotiations, to my knowledge, financial negotiations, or contract negotiations, that were undertaken with Douglas at that time.

Q. Do you recall having had any discussion with Mr. Damon with respect to the relative merits of the Douglas aircraft or the Lockheed aircraft?

A. I don't remember any specific discussions with him. I do know that we did have them, and I am quite sure that the topic was discussed in the board meetings.

Q. Do you know of any discussions or communications between anyone in TWA and Mr. Hughes relative to the decision to acquire Lockheeds rather than Douglases?

A. I don't know of the discussions with Hughes, if there were discussions, by anyone in TWA.

Q. You don't know of any?

A. That is what I have said.

* * * * * * *

[fol. 15693] By Mr. Cox:

Q. Mr. Leslie, referring to Defendants' Exhibit 205, which is the schedule of financing arrangements which you prepared, I call your attention, on page 2, to the second item, which is "Conditional sale contract, 2½ per cent due 5/1/55," and ask you if you recall to what that item relates.

A. Yes, I do. It was to the acquisition of certain Constellation aircraft, five of them, I believe.

Q. Could you describe the circumstances under which those aircraft were acquired, generally, how they were financed?

A. They were financed through a conditional sales contract between—running between TWA and the Hughes Tool Company, and I believe secured by five or six Constellation aircraft which had been initially purchased by the Hughes Tool Company from Air France and KLM.

Q. Do you recall what consideration was given by TWA to possibly other forms of financing these aircraft?

A. I would need to have my memory refreshed somehow, because I may be confusing one block of aircraft with another when I am talking here.

Q. Let me hand you—

A. There were several transactions over a period of time [fol. 15694] that related to conditional sales contracts with the Hughes Tool Company, and I am not—I don't want to appear stupid here.

Q. Let me hand you what has been marked Defendants' Exhibit 140, which is a motion before the CAB for approval of six Constellation aircraft, and let me ask you to look at that in the hope that it will refresh your recollection as to this transaction (handing to witness).

A. I am sufficiently refreshed. TWA learned of the availability of these aircraft and in the then state of the market it appeared that if they were not picked up immediately they would find other buyers, and the—and TWA requested the assistance of Tool Company, who initially purchased them, and that we in turn would pick them up from the Tool Company, since we were unable to purchase them out of our cash assets, and could not negotiate a credit rapidly enough to make the purchase.

This they did. The aircraft were delivered into the custody and went into the service of TWA shortly after the Tool Company acquired them, and the working out of a conditional sales contract waited upon the approval of the CAB.

There was no—it was a requirement of the Equitable indenture that we gain their consent to the acquisition of [fol. 15695] these aircraft, and the form was a—the form of the credit instrument was a conditional sales contract without recourse upon the general credit of TWA as required by the Equitable.

The rate was 2½ per cent, and that was the time—the financing was 100 per cent financing, the prime rate—and the rate was 2½ per cent, which was the prime rate at the time, and these—this arrangement was so much more favorable than we could hope to get in any other direction that we did not attempt to better that.

Q. Do you recall the circumstances under which Hughes Tool Company learned of the availability of these Constellation aircraft?

A. They learned of their availability from TWA.

Q. I note on page 2 of Defendants' Exhibit 140, paragraph 2, there is the statement:

"TWA had been endeavoring to purchase additional Constellation airplanes when the availability of these six aircraft was discovered by Hughes Tool Company while it was investigating the possibility of obtaining the use of one Constellation airplane for temporary use for test purposes. Hughes Tool Company immediately advised TWA that these six airplanes were available."

[fol. 15696] Do you have any information which is inconsistent with that statement?

Mr. Barr: I am going to object to the form of that question; calling for a conclusion of the witness.

The Special Master: Sustained.

Mr. Barr: I don't object to the substance of the question.

Q. Would you describe what you know as to the circumstances under which these aircraft became available?

A. As I had said, my impression was that TWA learned of these aircraft and made that fact known to the Hughes Tool Company. I apparently am wrong on that, but it is also probable that the information was contemporaneous, in any event. If you are intent on selling something from the seller's point of view, you ordinarily don't keep it a secret.

Q. Do you recall having any conversations yourself or do you know of what other conversations there were between executives of TWA and executives of the Hughes Tool Company with respect to these aircraft at the time that it was first realized that they might be available?

A. I find myself in a little dilemma here, and that is as to whether at that time I was with—no. I have answered [fol. 15697] myself right here. No problem.

The Witness: Would you read the question?

The Special Master: Read the question.

(The question was read.)

A. Well, my memory tells me that we—that upon hearing of the availability of these aircraft we immediately called the Hughes Tool Company to see if they would assist us in their acquisition, and I do remember making a call in this connection myself because of the rapidity with which the deal needed to be done if we were to in fact get the airplanes.

I believe that I handled the transaction, in a sense, for the Hughes Tool Company here in New York in making payment to at least Air France, the aircraft that were picked up from Air France, by way of a certified check from the Tool Company.

Q. Do you recall with whom at the Hughes Tool Company you had this conversation?

A. I would have dealt with Noah Dietrich.

Q. Do you recall what part, if any, Mr. Damon played in these arrangements?

A. I don't recall what part he played.

Mr. Cox: Let me ask that there be marked at this time a telegram from Mr. Damon to Mr. Dietrich, apparently [fol. 15698] dated January 10, 1950, as Defendants' Exhibit 224, and let me also ask that there be marked with the next Defendants' Exhibit number a telegram from Mr. Dietrich to Mr. Damon of the same date.

(Photostat of telegram dated January 10, 1950, to Noah Dietrich, from Ralph S. Damon, marked Defendants' Exhibit 224 for identification, as of this date.)

(Photostat of telegram dated January 10, 1950, to Mr. Ralph S. Damon, from Noah Dietrich, marked Defendants' Exhibit 225 for identification, as of this date.)

Q. Mr. Leslie, let me hand you what has been marked as Defendants' Exhibit 224 and what has been marked Defendants' Exhibit 225, and ask that you read over these two telegrams.

A. I have read them.

Q. Do you recall being informed by Mr. Damon as to the agreement that he had reached with the Hughes Tool Company which is reflected by these two telegrams?

A. I believe that we worked jointly on this. My office was next to his. I think that we just had telephone conversations with Dietrich and confirmed understandings by telegram. I think this was necessary, made necessary, in connection with the seller's demand for evidence they had a firm deal.

[fol. 15699] Q. At the time that these telegrams were sent, namely, on January 10, 1950, was there any understanding between Hughes Tool Company and TWA as to how these aircraft were ultimately to be financed?

A. No, I don't believe there was any understanding at that time.

Q. Mr. Leslie, I don't quite understand why it was that Hughes Tool Company could act to, in effect, bind the deal and TWA could not, and I would like if you could explain that to me a little more fully.

Mr. Barr: Could I have that read?

(The question was read.)

A. TWA was unable to purchase the aircraft because it did not have sufficient funds in hand to make a cash payment and could not realistically conclude a credit agreement within the very narrow time which was available to insure that the planes would be taken up as against other prospective purchasers. It was, generally speaking, a seller's market in those days.

Q. Mr. Leslie, let me hand you what has been marked Defendants' Exhibit 200 (handing to witness).

Mr. Barr: Mr. Cox, I wonder if before you leave these exhibits you would mind establishing whether the witness can recall having seen these telegrams at the time or has [fol. 15700] ever seen them before.

Mr. Cox: I would be glad to ask him.

Q. Did you see these telegrams at or about the time they were sent, Mr. Leslie?

A. I am sure that I did.

Q. Do you recall discussing with Mr. Damon either of said telegrams?

A. Well, I believe that I made the calls to Dietrich and arranged the—I believe that the negotiations with the Tool Company were initiated by me, and that this wire is confirmation of those discussions, even though signed by Damon.

Q. Would you look at Defendants' Exhibit 200, which is the minutes of the Board of Directors of TWA of January 13, 1950, and let me call to your attention what appears on page 3 thereof, under the heading "Purchase of six additional 049 Constellations," and I will ask you to read that.

A. I have read it.

Q. Do you recall that Board of Directors meeting? I note you were there.

A. Yes, I believe that I do.

Q. Would you describe what you recall as to the discussion, if any, with respect to the purchase of these six [fol. 15701] additional 049 Constellations?

A. Well, I can't—I find it difficult to add anything to the preamble to the resolution. It seems to—without remembering any specifics that were stated at that time, I would say that overall that paragraph represents—is a fair presentation of what was said to the board.

[fol. 15702] Q. I notice that the resolution which was adopted recites:

> "That the proper officers of this corporation be authorized, subject to any necessary approval required from the Civil Aeronautics Board and any consents or waivers required under the existing agreements of the corporation with the Equitable and various lending banks, to purchase, on a conditional sale basis, the six Model 049 Constellation aircraft."

What discussions had there been prior to the meeting as to the entering into of a conditional sales arrangement with Hughes Tool Company?

A. I believe that there had been a conversation between the time of the acquisition of—well, between the time of these two telegrams, the date of these two telegrams, and the Board meeting on the 13th some days later with the Equitable, and that the Equitable had indicated that they were in favor of this acquisition—or, rather, they would allow this extension of a credit only insofar as it was a nonrecourse instrument.

I believe that I had discussed with Damon and with Dietrich the fact that the nonrecourse conditional sales contract for 100 per cent of value could not be undertaken easily, that it would probably be impossible to find a buyer [fol. 15703] for such paper, and that that being the case, the Tool Company had indicated they would be willing to work out such an arrangement, charging the corporation the interest rate which they were paying for their borrowings at that time, which happened to be the prime rate.

Q. Do you recall who at the Tool Company indicated that they would be interested and how this subject first arose?

A. Well, I think the thing—I think it was contemporaneous. I think everything happened at once. The desire on the part of TWA to acquire the airplanes immediately brought along with it the necessity of financing the airplanes, either paying for them out of cash by TWA, which it couldn't do, or else how would they be paid for. So the two things were discussed at the same time.

Q. Do you recall any discussions of any other means of financing this acquisition by TWA, such as through bank loans or the like?

A. No. I believe that there was little negotiation necessary because the Hughes Tool Company indicated that it was willing to offer its credit on those terms, and they were taking a piece of paper which would not qualify for that kind of a rate in a normal banking transaction.

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[fol. 15707] Q. I note the first letter of what has been marked Defendants' Exhibit 226 is a letter from you to Mr. Dow. The last paragraph reads:

"The proposed method is certainly much more attractive [fol. 15708] to TWA than open market financing, longer terms, sixty months, greater percentage carried by the seller initially, 80 per cent of cost, lower interest rate, probably 2⅜ per cent and, most importantly from my view, the form, conditional sales contract, not involving our general credit."

First of all, let me ask you if you recall any conversations with Mr. Dow as to the advisability of TWA's entering into a conditional sales contract with respect to the financing of these aircraft.

A. I believe there was a discussion with Mr. Dow concerning this transaction, and that he indicated that he would only approve a nonrecourse credit agreement, and that as a result of this that was—the conditional sales agreement form was hit upon as the simplest. The Hughes Tool Company was willing to undertake the financing on these terms, which would have been impossible for TWA to undertake with its bankers otherwise.

I note on this letter of January 17th that I say:

> "Most importantly from my view, the form, conditional sales contract, not involving our general credit."

While it doesn't touch upon any conversations with Mr. [fol. 15709] Dow, that I think was just a bit of diplomacy. Certainly from TWA's point of view; TWA, it was more satisfactory to have a conditional sales agreement or a financing which in the case of receivership did not invade its general credit than one which did.

Q. Returning for a moment to the letter of January 17th to the Mellon Bank, the first of the two letters to the Mellon of that date, I note that the letter states:

> "Since quick physical possession of at least four of the aircraft, as soon as Air France has delivered them to the Hughes Tool Company, is of primary importance to us, and the available conditional sale basis outlined in the enclosed notice letter is deemed advantageous to us, it would be in our interest to obtain relief from the running of the thirty-day period provided by the sections of the credit agreement and chattel mortgage referred to in the first paragraph of the enclosed notice letter."

Was such relief in fact obtained, do you recall?

A. I don't recall. This was—this must have been the sections relating to their right of first refusal.

[fol. 15710] Q. Do you recall any discussions which you had with any representative of the Hughes Tool Company as to whether this conditional sales contract should or should not be without recourse or which any other representative of TWA had as to which you have any knowledge?

A. I believe that I indicated to Mr. Dietrich that it was a requirement of the—I believe I indicated to Mr. Dietrich that the only basis upon which these aircraft could be acquired was one of no recourse.

Q. What was Mr. Dietrich's response to you?

A. That the Hughes Tool Company would be willing to do the financing, undertake the financing.

Q. Turning for the moment to Defendants' Exhibit 140, which is the application to the CAB with respect to this transaction, let me call your attention to Exhibit 1, which appears to be a sales agreement executed as of the 2nd day of February 1950 between Hughes Tool Company and TWA, and let me first of all ask you if you can identify this as a conformed copy of the agreement which was in fact made.

A. I lost my way here a little bit. What is it we are looking for?

Q. Exhibit 1.

A. Exhibit 1?

Q. Yes, which is about seven pages back.

[fol. 15711] A. This Air France agreement, is that it?

Q. No, this one here (handing to witness).

A. All right. I have it.

The Witness: What is the question?

(The question was read.)

A. I can't identify it as such. This is something between the Hughes Tool Company and Lockheed.

Q. You are looking at a different agreement than I am.

A. Maybe you will show me what it is that you want (handing to counsel).

Q. (Handing to witness.)

A. Yes, this would appear to be that.

Q. I note that on page 4 this agreement provides for an interest rate of 2½ per cent per annum on the unpaid balance, and I wonder if you recall any discussion as to that interest rate between Hughes Tool Company and TWA.

A. Yes, I recall very clearly discussion on that point.

Q. Would you describe those discussions, with whom they took place, and, as nearly as possible, when they took place?

A. The discussions were between myself and Dietrich and the then general counsel for Hughes Tool Company, [fol. 15712] T. A. Slack, and it was held by them and by

Mr. Slack, I should say, most particularly, that the Control Case, 1944, provided that there should be no profit to either side, either TWA or Hughes Tool Company, in any transactions one with the other, and that being the case, that the interest rate which was to be paid by TWA could not be greater than the amount which—greater than the rate which Hughes Tool Company could borrow, and that was held to be 2½ per cent. My memory tells me that was the prime rate on 90-day money at that time.

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[fol. 15724] By Mr. Cox:

Q. Mr. Leslie, at the close of yesterday's session you were describing a conversation which you had with Mr. Dietrich and Mr. Slack as to the interest rate to be charged TWA in connection with the conditional sales agreement as to the 049 Constellations we were discussing.

Do you recall whether anybody else except you and Mr. Dietrich and Mr. Slack was present at that conversation?

A. I wouldn't have characterized it as a conversation. I do remember that there were discussions that were—there were discussions that related to this aspect of dealings between Hughes Tool Company and TWA relative to the 1944 Control Case which ended in the view, most particularly of Mr. Slack, that there must be kept in mind this fact of no profit in any dealings, one side or the other, with each other.

Q. Do you recall approximately when these discussions took place?

A. Just prior to the decision to have a—to use the conditional sales form for the financing. I might correct something which I said yesterday, correct it, amplify it.

I believe the conditional sales form was hit upon as a result of the Equitable's view on their unwillingness to see further mortgage obligations, and it was decided that the use of a conditional sales contract, no recourse, in fact could not really be defined as funded debt, because it was [fol. 15725] really only a month-to-month lease, and would not need the approval of the Equitable at all. So while it might, on its face, appear to be—stated to be a conditional sale, it could equally be considered nothing more than a month-to-month lease of equipment. That was the reason for using the conditional sales form, as I remember it now.

Q. Do you recall discussions with some particular person at the Equitable on the subject?

A. I don't recall any particular discussions. They would have to have been with Mr. Dow. I am sure there were. I don't recall them.

Q. Do you know what disposition, if any, Hughes Tool Company made of the conditional sales agreement?

A. I believe that they discounted the paper with a bank, with their banks, at the same rate. I think the record could show that.

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[fol. 15726] Q. Mr. Leslie, turning to Defendants' Exhibit 205, which is your chronological listing of financing arrangements, I note that the first item on the top of page 2 relates to $12,846.624 principal amount of equipment mortgage notes, Series A, 3 per cent due 5/31/56, and I wonder if you could identify to what that financing related.

A. I believe that was the Martin financing, financing of the Martin airplanes, some forty Martin 404s.

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[fol. 15731] By Mr. Cox:

Q. Mr. Leslie, let me hand to you what has been marked as Defendants' Exhibit 197 (handing to witness).

Let me call to your attention what appears on page 3 with respect to program for DC-3 replacement.

A. I have read it.

Q. You will note there, in the first place, that there is reference to three available types of replacement aircraft. You have mentioned Martins and Convairs. Do you recall what the third available type was?

A. I believe that he may be speaking of the Martin 202, the Martin 404, and the Convair.

Q. Let me suggest that there was also some consideration given to a Douglas Super DC-3.

A. Oh, hell. Okay. All right.

Q. I take it that not a great deal of consideration was given to it?

A. No. My memory tells me that the Douglas Company had a view of rehabilitating or improving the characteristics of the DC-3 by the addition of a—by the institution of an improved wing, which would give it greater speed, and a larger engine. I believe there were fifteen of those [fol.15732] aircraft which were finally built and were purchased by—largely by U. S. Steel Corporation for their private fleet. But that program really never got off the ground.

I agree that there was that airplane. But after it was all done, it didn't have the characteristics of the pressurized Martin or Convair.

Q. I notice that the next sentence reads:

"Negotiations contemplated the leasing ~~as soon~~ as available, of a relatively small number of units, pending the manufacturer's construction and delivery of an order for thirty improved new production units with options for the purchase of additional aircraft."

Do you recall the discussion of the program for DC-3 replacement at this board meeting?

A. Not in any detail. But are you asking a question that relates to the leasing of aircraft?

Q. I was going to ask you how the idea of leasing a small number of aircraft originated and who originated it.

A. Well, this is associated with the Martin 202, which had a weak spar, wing spar, and Northwest Air lost some airplanes which, it was concluded, were due to this poor design, and I believe Northwest Air had turned these airplanes back to Martin.

Martin had a fix on the spar which was concluded made it again a satisfactory airplane, although unpressurized. [fol. 15733] They were looking for a market, and they indicated that they would make these airplanes available on lease. This would be a temporary—would meet some of the demand requirement of TWA for DC-3 replacement airplanes pending the production and delivery of the pressurized improved Martin 404, and that was what was being discussed, and that was what in fact was later done.

Twelve of those airplanes were leased, and later purchased, at expiration of the lease.

Q. Was a similar lease proposal made by Convair, roughly?

A. No. I do not remember any lease proposals by Convair. They had—except if we accept the fact that Convair had a subsidiary company called Airfleets, I believe they offered some airplanes which they had. I don't recall the number of airplanes they had available. It wasn't quite parallel to Martin, but I remember there was an Airfleets' offer.

Q. The minutes of December 2, 1949, which have been marked Defendants' Exhibit 197, reflect that:

"The president reported the manufacturer's proposals for changes in present production models and that offers as to rental charges, purchase price, delivery dates and terms of payment. Advantages and disadvantages of each of the proposals, alternative possibilities and methods of financing were discussed."

[fol. 15734] Do you recall any discussion of various possible methods of financing at this board meeting?

A. Not specifically, no.

Q. Do you recall discussions at or about this time of various possible methods of financing?

A. Well, I believe that in connection with the Martin airplane it should be remarked that Martin was very close to bankruptcy, and that there was a problem posed for Martin's bankers in the financing required to cover the inventory and production costs of this project, this airplane, if it went forward, and there was a doubt as to Martin's personal capabilities in management of the company.

This was not a problem in the case of Convair. So that the question of financing that is discussed in alternatives here certainly related to discussions that we were having with the Mellon Bank and the Bankers Trust, that they in turn were having with Martin and other banks that were standing behind Martin.

I suspect that what we were discussing here at this time resolved around this Martin financing problem, and possibilities, as well as the more straightforward one of dealing with Convair.

Q. Do you recall who the Martin banks were?

A. My impression was that the Chase Bank was the lead [fol. 15735] bank in the Martin picture, although I—carrying the thing somewhat forward in point of time, I believe the Mellon Bank ended up as the lead bank eventually, because certain things were done.

You haven't asked me that question yet, but this follows. Certain things happened in Martin management as a result of the Martin order on the part of Eastern and TWA.

Q. Would you describe the certain things that happened in the Martin management?

A. Well, Glenn L. Martin was required to trustee his stockholdings, and he was replaced as the head of the company, and it is only upon those terms that the banks were willing to finance Martin.

That being the case, why, the TWA banks were willing to finance the purchase, and Eastern was favorable, at least, if not eager, to purchase the Martin airplane, and they did undertake sixty, and we undertook to purchase, I think, thirty-five, it may well have been thirty, and they thought they had a few other orders, which were sufficient to allow them to move ahead.

I don't think it was quite the hundred in number that they stated as a premises in the beginning.

There was also certain rebates which were worked into the contract of the price of the airplane if Martin was [fol. 15736] successful in selling in numbers I believe above 150.

Q. Mr. Leslie, one thing that I don't quite understand. You may begin to repeat something you have testified to before, but if you have, I don't recall it, and I am sure Mr. Barr will remind me if you have.

What I don't quite understand is, if the planes were basically the same, and there were questions about the management and solvency of the Martin Company, why TWA made the decision to acquire Martins rather than Convair aircraft, and I wonder if you could illucidate on that a little.

[fol. 15737] Mr. Barr: I don't object to his testifying to anything in addition to what he has already testified.

The Witness: Would you repeat the question?

(The question was read.)

A. Well, I think that the short answer on it would be that TWA was convinced the Martin 404 would be a satisfactory airplane, and that Rickenbacker stood ready with a substantial order that would insure manufacture, and that the banks had assured sufficient credit support to make it a reasonable venture or reasonable purchase.

We didn't care one iota about Martin's problems so long as they were solved. They had built a 202 which was almost a prototype of the airplane.

We also had the judgment of Eastern Airlines to go along with our own. It is more or less a question of why Chesterfields and Camels.

Q. Did the availability of the twelve Martin 202s play any part in the making of this decision?

A. I doubt that that had very much bearing—I doubt that that had a very important bearing on the decision.

Q. Mr. Leslie, let me hand you what has been marked as Defendants' Exhibit 204, which are the minutes of the Board of Directors of TWA of February 24, 1950, and let me call to your attention what appears on pages 2 and 3 [fol. 15738] under the heading "Contract for purchase and lease of Martin airplanes" (handing to witness).

A. I have read it.

Q. Do you recall this meeting of the Board of Directors of TWA?

A. Not specifically.

Q. I note on the first page of the minutes that Mr. C. W. Dow, Manager, Industrial Securities of the Equitable Life Assurance Society of the United States, was among those present by invitation.

Do you recall how Mr. Dow happened to be present, who asked him to be present?

A. I believe that the Equitable was, as a matter of course, provided with the minutes of the Board meetings, a matter of routine at each Board meeting, and that he was regularly invited to attend the Board meetings by a letter from the secretary of the corporation.

Q. Did he?

A. He very seldom attended, but apparently he accepted this particular invitation.

Q. I note that this meeting was held at the Beverly Hills Hotel, Beverly Hills, California.

Do you recall whether at or about the time of this meeting there were discussions with representatives of the [fol. 15739] Hughes Tool Company as to TWA's equipment program?

A. I am sure this was discussed with Mr. Dietrich.

Q. I note that the material under "Contract for purchase and lease of Martin airplanes" states that Mr. Damon "had entered into an agreement for the purchase of thirty Martin Model 404 airplanes with rights at the option of this corporation to purchase up to thirty additional airplanes of the same model. He advised also that a further agreement had been entered into covering the lease by this corporation of twelve Martin Model 202 airplanes which would be used pending the delivery of a sufficient number of Martin Model 404s to provide for their replacement in operation."

That, I take it, accurately reflects the number of aircraft which were involved in the Martin purchase and lease at this time?

A. I believe so.

Q. At the time of this meeting had any arrangements been made with respect to how these aircraft were to be financed?

A. I do not believe there was any definitive credit agreement, but I do believe there was a tentative understanding with the Mellon that the financing required would be made available by the company's bank group.

[fol. 15740] I might point out that the contract terms undoubtedly provided that the contract was only a contract subject to financing satisfactory to seller.

I think at that time it was just really a bamboo contract.

Q. What is a bamboo contract?

A. A contract really that is, let us say, in name only, just agreement to agree.

* * * * * * *

[fol. 15745] Q. Do you recall that in February or March of 1950 TWA, in addition to giving consideration to the Martin program, was also giving consideration to an equipment program which included the purchase of fifteen Lockheed K-49s?

A. We—TWA undoubtedly was considering further long haul aircraft purchases at that time.

Q. I note the first paragraph reads:

> "The program is of such magnitude that it is impracticable to finance through conventional bank borrowing and company funds and, if practicable, would seriously weaken the position of the equity."

Do you recall any discussions, either with representatives of TWA or of Hughes Tool Company, that the financing of the program through conventional bank borrowing and company funds would seriously weaken the position of the equity?

A. In the light of my review, I am sure there were discussions.

[fol. 15746] Q. Do you recall with whom those discussions took place?

A. It certainly would have been with Dietrich.

Q. Do you recall what the substance of those discussions was?

A. Certainly the answer is iffy. I undoubtedly would have discussed these basics of what I presented in this memorandum since we were committed to the Martins and the Lockheeds were in addition to a fairly ambitious program.

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[fol. 15750] Q. Let me call to your attention in Defendants' Exhibit 228 what appears on the second page thereof:

> "In connection with the acquisition of the Martin 404 aircraft and the creation of additional funded debt by TWA, the Hughes Tool Company, owner of approximately 74 per cent of the company's capital stock, will agree to purchase from TWA prior to December 31, 1951 sufficient shares of TWA capital stock so that the net proceeds shall be at least $5 million; however, the Hughes Tool Company

will be released from such obligation if TWA sells to others [fol. 15751] sufficient shares of its stock to net proceeds of a like amount."

Do you recall discussions, first of all, with the Equitable as to such a commitment by Hughes Tool Company?

A. I believe there was such a commitment.

Q. Prior to the making of that commitment what do you recall as to—

Mr. Barr: Excuse me. Could I have the question and the answer read, please?

The Special Master: Read the question and the answer.

(The record was read.)

Q. (Continuing) —as to discussions with the Equitable as to either the necessity or advisability of such a commitment being made?

A. Well, I don't remember the specifics, but certainly there were discussions with the Equitable relating to the Martin financing, and they indicated the condition that they would impose, and I believe they used TWA as the conduit to inform the Hughes Tool Company of what they were going to require for approval.

[fol. 15752] Q. Do you recall who at TWA they used as a conduit?

A. Well, I would no doubt have been the one talking with the Equitable.

Q. Do you recall whom at the Equitable you were discussing this matter with?

A. This would have been with Dow.

Q. Do you recall how the subject of a commitment by Hughes Tool Company to, in effect, insure $5 million of additional equity was first raised?

A. I believe the view of the Equitable was that with the increased debt involved in the Martin purchase there should also be an addition to the equity. It is not my impression that the Equitable had any concern as to whether the Hughes Tool Company put up the funds or it was found from the general public, but they recognized that the Hughes Tool Company, as the major stockholder, had the power to either, A, force the sale of stock to the public or, failing that, to supply the funds.

Q. Do you recall any discussions with a representative of the Hughes Tool Company as to whether or not the Hughes Tool Company would be willing to make such a commitment?

A. There must have been such conversations on my part, and they would have been with Dietrich. There may have [fol. 15753] been conversations by Damon on the subject with Dietrich.

Q. Do you recall what was said during these conversations?

A. I don't recall, other than the passing on of the Equitable—of the Equitable's view.

Q. Do you recall what Mr. Dietrich said when he heard the Equitable's view?

A. I don't believe that he considered it a request that was beyond—or a demand which was beyond reason, nor a particularly difficult one to satisfy.

Q. Do you recall whether at this time—

A. You might recognize one thing, that in my discussion with Dietrich it was my view that this was not an unreasonable view on the Equitable's part.

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[fol. 15757] The Special Master: I will permit you to ask, Mr. Cox, whether or not anything was done by the Hughes Tool Company in regard to that proposal for additional equity.

[fol. 15758] Mr. Cox: All right.

Q. Would you answer that question, Mr. Leslie?

A. I believe that there were meetings by Mr. Dietrich with the Equitable and that this finally resulted in agreement on the part of the Tool Company to guarantee the issuance of $5 million of stock, generally in conformity with what is put forward here in 228.

Q. Were you present at any discussions between Mr. Dietrich and the Equitable on this subject?

A. I can only say I am sure that I was, but I can't remember the—I can't remember a specific meeting.

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[fol. 15759] By Mr. Cox:

Mr. Leslie, have you had an opportunity to read what has been marked as Defendants' Exhibit 229?

A. I have read it.

Q. Does the reading of that exhibit in any way refresh your recollection as to the negotiations between the equitable and TWA or the Equitable and Hughes Tool Company or TWA and Hughes Tool Company with respect to an arrangement for the furnishing of additional equity?

A. It appears to me that there was a meeting of the Equitable at which what they had put forward to their senior committee had been approved, and this letter is the sequel to that, and that in turn, since it related to the Hughes Tool Company, I am sure we must have passed it to them, we must have discussed it with them immediately, and I must have discussed it with Dietrich.

Q. But you don't recall any more than you have as to those discussions?

A. No. I do believe that subsequent to this there was a meeting between Dietrich and—or meetings—between Dietrich and Dow, and again I think I must have been along to see that—to see if they could be rocked off their position. [fol. 15760] But I am very vague as to the meetings themselves.

Q. First of all, let me ask you whether you remember seeing Defendants' Exhibit 229 at or about the date it bears.

A. I am sure that it would have come directly to me.

Q. Turning to Exhibit A to Defendants' Exhibit 229, I note that it is recited, in the third whereas clause:

"Whereas Equitable deems it desirable that TWA acquire the airplanes," referring to thirty Martin 404 airplanes.

Do you recall any discussions with the Equitable as to the desirability of TWA acquiring the airplanes?

A. Yes, indeed. It required the consent of the Equitable for us to undertake the credit which was a necessary part of the purchase, and there were discussions with the Equitable prior to this time.

Q. Do you recall what was said during those discussions?

A. I am sure it would have been the same presentations that we had made in the past in connection with aircraft purchases. We would have presented the Equitable with a forecast and showing of what we believed the aircraft [fol. 15761] would do for us, and asked for their consent. I am positive this was done.

Q. Do you remember any discussion as to whether it was advisable to buy Martin aircraft rather than some other aircraft?

A. I am sure this must have been a part of the discussions, but I don't remember them specifically.

Q. Do you recall whether in fact the Tool Company, TWA and the Equitable did enter into an agreement in the form annexed as Exhibit A to Defendants' Exhibit 229?

A. I believe they did.

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[fol. 16285] By Mr. Davis:

Q. Will you let me know when you have finished reading Exhibit 269, Mr. Leslie, please?

A. I have read it.

Q. First you will note that there is a reference in the third paragraph to a general refinancing program of the Glenn L. Martin Company, which states that this refinancing program for TWA amounted to $1 million. Has that refreshed your recollection as to the nature of the refinancing program that was taking place at or about that time by the Glenn L. Martin Company which involved customers of Glenn L. Martin?

A. The manufacturer of the 404 airplane by Martin was an ill-starred venture. They found their costs far exceeding their estimates, their sales price, and indeed the com- [fol. 16286] pany was on the verge of bankruptcy.

As a result they required substantially more credit than had been envisaged in the beginning, and this involved the customer to the extent that it was pointed out to them without an increase in the price of the aircraft, that they might not in fact be manufactured. This would have been a serious development for both Eastern and TWA who had jointly purchased 100 of the aircraft.

Q. By "purchased," you mean placed orders for but not yet received?

A. Placed orders for. The willingness of the banks to extend credit to Martin included a number of restrictions on Martin management, plus the willingness of the customers to accept a fairly substantial increase in price.

Q. My prior question was, can you tell me whether or not this decision by TWA to purchase the twelve 202 Martins which had been on lease, was a part of this refinancing program by Glenn L. Martin, or was it something which developed quite independently of that program?

A. I believe the purchase of the Martin aircraft was independent of the general refinancing program of Martin.

Q. Can you identify for me the persons, the identity of the persons who developed and negotiated this refinancing program? First let us refer to those representing the [fol. 16287] Martin Company.

A. I don't remember the names of those in the Martin Company, except to state that I believe a man by the name of Bunker, who was brought in as the head of the Martin Company about that time. So I take it he was primarily the individual who negotiated this for Martin.

As for TWA, it would have been certainly Ralph Damon, the president of TWA, and the minutia would have been Erle Constable, the treasurer.

Q. Do you know to what extent this refinancing program involved discussions or conferences between the lending institutions holding the obligations of TWA, with the lending institutions having an interest in the Martin Company?

A. I am not familiar with those conversations other than to know that there were such.

Q. Do you know whether or not the Hughes Tool Company or Mr. Hughes was in any way involved in this Martin Company refinancing program?

A. I was with the Hughes Tool Company at the time, and I don't believe that we had any discussions with the Martin Company.

Q. You see in the next paragraph there is a reference to the fact that TWA had also recently contracted "with per- [fol. 16288] mission of the Society," the purchase of 12

Martin 202As at an aggregate price of $5,100,000. Can you tell me who obtained this permission of the Equitable?

A. I could only say it was TWA itself.

Q. I understand, but do you know who at TWA?

A. No.

Q. Can you tell me whether or not the Hughes Tool Company or Mr. Hughes or anyone whom you would associate as a representative of the Hughes Tool Company had any conferences or discussions with the Equitable relative to this permission?

A. I don't believe that the Tool Company had any discussions with the Equitable in this connection.

Q. Have you ever had occasion of discussing with anyone of the Equitable this transaction or credit relating to the 12 Martin 202As, at any time?

A. None that I can remember..

Q. They may have taken place, but you don't remember?

A. No, if they had taken place I would have known.

Q. The next paragraph refers to a modification or amendment to the indenture, the securities held by the Equitable, to permit a change in the credit agreement between the banks and TWA. Did you have anything to do with that at all?

[fol. 16289] A. Nothing.

Q. I beg pardon?

A. I had nothing to do with it.

Q. Do you know who negotiated with the banks this additional credit under the 1950 credit agreement to permit TWA to purchase these 12 Martin aircraft, rather than to continue to lease them?

A. I believe it would have been Erle Constable.

Q. I note that the next paragraph refers to the interest rate on the then existing bank notes as 3 per cent, and that on this additional amount to be borrowed in order to purchase these 12 Martins, the interest rate was referred to as being at 3¾ per cent. Do you have any knowledge or information as to how that interest rate was arrived at?

A. No, I do not.

Q. You had never been told by anyone how it was determined?

A. I can surmise, but I don't know.

Q. At this point I am asking whether or not you have any recollection of any kind as having been told by anyone? I am asking for hearsay.

A. I have no recollection of any discussion on the matter. [fol. 16290] Q. Will you look at the second page of Exhibit 269? There is a reference to the fact "as consideration for the above changes, Trans World Airlines will pay the Society a fee of $75,000."

Do you have any knowledge or information with respect to the circumstances relating to that aspect of the matter?

A. I don't recall any.

Q. Beg pardon?

A. I do not recall any.

Q. Do you know whether or not TWA in fact did pay the Equitable a $75,000 fee?

A. I believe they did, yes.

Q. But you have no knowledge or information whatever as to what it was or how it was negotiated, is that correct?

A. I believe they charge it on the theory that there was a considerable amount of work necessary to appraise the request. There was a certain amount of work in giving the clear answers to enable the credit to be undertaken.

Q. Is that your complete answer?

A. Yes.

Q. What is the basis for that belief, Mr. Leslie?

A. I suppose one would say it followed a pattern which [fol. 16291] ran through the relationships between TWA and Equitable, i.e., that each time a modification was requested, there was some small pound of flesh exacted.

Q. I understand the pound of flesh being exacted at every opportunity, but that is not my question, Mr. Leslie. Let me ask you this: In connection with prior requests to the Equitable in which you were involved, had the Equitable requested or suggested the payment of a fee as a condition of their consent, or part of giving their consent?

A. The record will show what has happened in the past

Q. My recollection—

A. There was an increase of interest which was required on one or two occasions.

Q. I do recall a condition of a change in the interest rate.

A. It is the same thing—increase in dollars.

Q. But this time you say that while you were not involved in the negotiations, you believe that the $75,000 was something that was asked for by the Equitable on the theory that some work was necessary in connection with the processing or approving of the consent.

I am trying to find out from you whether or not that so-called theory had been advanced, to your knowledge, prior thereto in connection with requests which you had [fol. 16292] made.

A. That is my theory. I am not relating it to other theories.

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[fol. 16887]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

Continued Deposition of Plaintiff Trans World Airlines, Inc., by Emmett Osborn Cocke—December 7, 1962

[fol. 16948] AFTERNOON SESSION

2:00 p.m.

(John R. Hupper, Esq., attended the afternoon session.)

Emmett Osborn Cocke, resumed the stand and testified further as follows:

Examination (cont'd).

By Mr. Davis:

Q. Mr. Cocke, I see that you testified on the Southern Transcontinental case on October 12th, and that on October 11th you discussed your testimony with Mr. Thomas. Can you identify at least in a general way the issues involved in this case?

A. It was an application by carriers for southern transcontinental route from points in Florida through Louisiana, Texas, to the West Coast.

Q. Can you identify the area of your testimony?

A. We were applicants for the route.

Q. What was the subject matter? I am interested in the subject matter covered by your testimony.

A. The same subject matter as I have stated that I covered in all of the route cases I testified in.

Q. You never identified what it is. Can you tell me now, perhaps in relationship to this discussion you had with [fol. 16949] Mr. Thomas, can you tell me what the area of your testimony was that you were discussing with him?

A. A question of how many aircraft TWA were going to acquire. At this time there had been knowledge by the CAB and generally that TWA had not completed its financing. The numbers of the airplanes had been shifting around. I was sure in this case I would be subject to cross-examination by opposing attorneys as to whether TWA was going to have any airplanes to operate this new route, and, if so, how many, and how we were going to get them.

Q. This referred primarily to jet aircraft?

A. Yes.

Q. And you discussed that with Mr. Thomas?

A. Yes. My recollection is that we weren't sure whether we were going to have twenty or twenty-five Convairs at that time.

Q. Twenty or twenty-five-880s?

A. Yes.

Q. Do you recall what Mr. Thomas said at or about that time?

A. I don't believe that a firm decision had been reached by that time, as I recall it. That was the subject also of the phone calls to Raymond Cook.

[fol. 16950] Q. You had telephone calls with Mr. Cook at or about that time?

A. I talked to him twice that day, as I have noted.

Q. How about the Boeings? Was there also some uncertainty at that time as to the number of Boeings acquired by TWA?

A. I don't believe there was any uncertainty as to the number 15 of the 131s, but I felt I would be subject to cross-examination as to how we were going to acquire the 15.

Q. How about the 331s?

A. I don't believe they were at issue in this case.

(Richard J. Riker, Esq., entered the hearing room.)

Q. Did you have a discussion with Mr. Thomas which covered also the Boeings as well as the Convairs?

A. In connection with the Southern Transcontinental case, yes.

Q. Can you tell me what Mr. Thomas said to you?

A. My recollection is that he didn't know whether it would be twenty or twenty-five.

Q. That is the 880s?

A. Yes.

[fol. 16951] Q. I am talking about the Boeings now.

A. I don't recall what he said about the Boeings.

Q. On Saturday, October 10th, your note indicates you were working on the Southern Transcontinental case. You had a phone call from somebody. Who was that person?

A. John Barch.

Q. Who is he.

A. He was on my staff. He had no relation to this subject.

Q. Then your diary indicates that you testified on Monday, October 12th. What is this phone from HH office.

A. I believe I also talked to Mr. Cook that morning. I proceeded to the CAB hearing room, and expected to be on the stand most of the day. When I completed my testimony before lunch, I returned to the office, the TWA office, and there was a phone message there from the Hughes office.

I called them and said I had already completed my testimony. I don't recall that there was any comment.

Q. Were you in fact examined in this CAB proceeding with respect to TWA's jet equipment program and its [fol. 16952] financing?

A. I was.

Q. Did your testimony fairly and accurately reflect the facts?

A. Yes.

Q. Do you recall the substance of your testimony relating to TWA's jet equipment program and its financing?

A. I believe I testified to the effect that we had not finally determined in our planning the exact number of 880s that would be acquired. It would either be twenty or twenty-five.

I believe I was questioned on the fact as to whether TWA had any right to these airplanes that were on order.

I believe my testimony was to the effect that we had always received the airplanes that were ordered by the Hughes Tool Company and I saw no reason to believe that we wouldn't receive these airplanes.

Q. How about your testimony with respect to the Boeings?

A. That same statement would apply to the Boeings.

Q. That is your recollection?

A. Except for the number.

[fol. 16953] Q. I am interested in numbers also.

A. I said except for the number.

Q. I am interested in what your testimony was at that time with respect to the numbers.

A. Fifteen.

Q. 131s?

A. Yes.

Q. How about the 331s?

A. I believe it would have been twelve.

Q. Have you had occasion to review your testimony in this Transcontinental case in the recent past?

A. I looked over it perhaps six weeks ago.

Q. Six weeks ago?

A. Yes.

Q. That was for the purpose of refreshing your recollection as to your testimony in that case?

A. Yes.

Q. Did you review your testimony in any other case besides the Southern Transcontinental case?

A. No.

Q. Was there any particular reason for having selected the Southern Transcontinental case for review?

A. I glanced through my diaries and noted these entries on the Southern Transcontinental case, and I felt this [fol. 16954] would probably be a question that would come up.

Q. Did you discuss at any time with Mr. Hughes the testimony that either you were to give or had given in these proceedings?

A. No.

Q. I have here some of your testimony in that matter, Mr. Cocke, and for the purpose of the record, it is in the matter of Southern Transcontinental Service case, Docket No. 7984. What I have before me is something which is marked Volume 67, dated October 12, 1959.

Who was Mr. Grundman in that hearing, Mr. Cocke?

A. I might be able to identify him if you let me see the transcript.

Q. Let me hand you a portion of the transcript. I am looking at page 11,177.

A. I am not sure, but I believe that would be the Bureau counsel, because I think he is the last of the attorneys in the cross-examination.

Q. This was before—

A. In the cross-examination order.

Q. This was a hearing before Examiner Stodola?

[fol. 16955] A. I don't recall the examiner's name. It should appear here. Yes, it was Examiner Stodola.

Q. The same examiner who heard the 1950 further control case. The record shows that.

Did you prepare some so-called canned testimony in connection with that proceeding—that is, prepared testimony with exhibits?

A. I don't recall whether there was prepared testimony in this case, or not.

Q. There is a reference to appendix C of your testimony. Look at page 11,129.

A. Yes. This would indicate that I did have prepared testimony in this case.

Q. Can you tell me who prepared that testimony for you, or who helped you prepare it, or who prepared it?

A. It would have been prepared with people from our Washington office, and attorneys from Chadbourne, Wallace, Parke & Whiteside. I think I recall seeing Mr. Paul, who handled this case.

Q. He was with the Chadbourne firm?

A. Yes.

Q. Did that canned testimony reflect the facts accurately and fairly?

[fol. 16956] A. As I knew them at that time, yes.

Q. I would like to have you look at particularly, Mr. Cocke, the testimony you gave beginning at page 11,177, where Mr. Grundman questioning you, says:

"Q. Your experience would be about the same. There is no exhibit in this book of exhibits that I can find that shows what TWA's present equipment situation is. What equipment it has on order, or if it hasn't any on order the Hughes Tool Company has on order. Can you tell us what the situation is, whether TWA has an order?"

Do you see that?

A. Yes.

Q. Start there and look at the answer you gave. The present knowledge and information you now have, is it consistent with the answer you then gave?

Mr. Williams: How far along do you want him to read?

Mr. Davis: I am looking at the answer to that question.

Mr. Williams: Just the answer to that question?

Mr. Davis: At this point. There are some explanatory questions.

[fol. 16957] Mr. Williams: Up to what page?

Mr. Davis: 11,184.

Mr. Williams: Would you mind, Mr. Special Master, having the witness read the answer into the record so that we all know? There are several counsel around this table who don't have copies.

You are asking him a general question as to whether he subscribes to what he said there.

By Mr. Davis:

Q. I am referring, Mr. Cocke—let me read your answers. Do you have any knowledge or information now, which was subsequently obtained, which is different from or inconsistent with the testimony you then gave?

The answer you gave was:

"A. Mr. Grundman, as you know we operate fifteen Boeing 707s, which is, I guess, a close second to the largest fleet of jets being operated by any airline domestically, which we have on lease from the Hughes Tool Company."

Was that statement correct?

A. Yes.

Q. Second to whom?

A. American Airlines.

Q. "The Hughes Tool Company have orders for addi- [fol. 16958] tional aircraft, 331s and 880s, and we will obtain additional numbers of aircraft from the orders or through the Tool Company, of this aircraft they have on order."

That statement refers to what—the 331s and 880s that were then on order by the Tool Company?

A. Yes.

Q. Do you have reference by this answer to the possibility of acquiring also some 990s?

A. I don't recall.

Q. The next question was:

"Q. Do you know what they have on order—how many?"

The answer was:

"A. The Tool Company has on order thirty Convair 880s, and originally eighteen Boeing 707s—331s, the intercontinental—of which they sold six of those aircraft to Pan American. So they have twelve left on order."

That refers to what you have testified to this morning?

A. Yes.

Q. "Q. Were those all ordered for TWA's existing system?

"A. Mr. Grundman, they were ordered by the Tool [fol. 16959] Company assignable to TWA.

"Q. Are those aircraft that are on order, after the sale of a certain number to Pan American, all required for TWA's existing system?

"A. Mr. Grundman, we have made studies, as I believe all airlines do in connection with jet equipment—continuing studies. We believe that in our present needs and our present planning that we will be able to economically use with benefit to TWA ten or twelve of the 707—331s. As to the Convair 880s we again would like to point out so we don't overlook the fact that these aircraft orders were placed back in 1956.

On the Convair 880s, we have had schedule programs with the use of thirty. We are continually looking at the various needs of our routes. We have looked at twenty. I guess all I could say at the moment, Mr. Grundman, the matter is still under study and we are continually reviewing our needs as conditions change so that the exact number of Convair 880s has not been finally decided.

"I would like to say in this concept that there is certainly nothing unusual in this, because from my knowledge of the [fol. 16960] action of other carriers who have placed large orders for these large jet airplanes many years ago, there have been a number of changes made in many carriers' orders. In fact, I don't know of any that haven't made some adjustments and changes in the numbers of airplanes they have ordered, or the types they have ordered since the original orders were placed. Certainly, for the most part my opinion is the orders for the most part, when things have been studied, orders have generally been reduced or shifted to a later type.

"So there is nothing unusual in the change in the numbers of airplanes as far as a carrier's needs."

Was that last answer I read to you—does that fairly reflect the facts as of the time?

A. Yes.

Mr. Hupper: I object to the form of the question, in that this is a means of calling for a conclusion of the witness. He has read testimony saying that there was nothing unusual, and this was generally the practice, and so forth, and he now asks him to adopt it as his own testimony.

If we were simply to ask him did he so testify at the [fol. 16961] time, then I would have no objection. I think he is trying to get some extra mileage out of this in the form of a legal conclusion of the witness now.

Mr. Williams: I think Mr. Hupper is right. I think he can say he testified truthfully at the time.

Mr. Hupper: He can say that was his opinion at the time.

Mr. Davis; I will accept that answer.

By Mr. Davis:

Q. Was that your opinion at the time?

A. Yes.

Q. What knowledge or information do you now have which is at variance with what you testified to at the time?

Mr. Hupper: Again I object to the form of that question on the ground that that in itself calls for a conclusion.

Mr. Williams: I join in the objection.

The Special Master: Sustained.

Mr. Davis: We will go line by line and take a little more time. I know these gentlemen don't want me to get to the [fol. 16962] next witness too soon. I appreciate the desire in which Equitable joins TWA in that regard.

Let us look at the first part of your answer. You first say:

"Mr. Grundman, we have made studies, as I believe all airlines do."

What studies are you referring to?

[fol. 16963] Mr. Hupper: I think this kind of rehash that Mr. Davis is going into now is evidence of the intention which he ascribes to me quite incorrectly of trying to delay as much as possible.

As far as I am concerned and as far as my clients are concerned, there is no desire to delay the time when the next witness reaches the stand.

I think I ought to make that clear on the record, and not remain silent in view of Mr. Davis' remarks.

Mr. Davis: If you have any further thoughts on the subject, you may express them any time you want to on the record or off the record, or to Judge Metzner.

By Mr. Davis:

Q. Now will you answer my question, Mr. Cocke?

A. This would refer to schedule studies that we made.

Q. Are you referring to studies other than the ones that we referred to yesterday and today?

A. There may have been others.

Q. You can't recall them?

A. No, I cannot.

Q. You then say, "We believe in our present needs and [fol. 16964] our present planning that we will be able to economically use with benefit to TWA 10 or 12 of the 707-331s."

What was the basis for that testimony, Mr. Cocke?

A. Management discussions that I pointed out before, as to how many jets TWA should acquire at this time.

Q. As reflected by the views of Mr. Thomas that you previously referred to?

A. Yes.

Q. Did those views of the management of TWA change subsequent to that testimony?

Mr. Hupper: I think this question, although it sounds all right, as you first listen to it, calls for a conclusion of this witness as to the viewpoint of various people, perhaps expressed, perhaps not expressed.

By Mr. Davis:

Q. I am not asking you to guess what people had on their minds and didn't say anything about it. I do expect you to testify as to the views of the management of TWA to the extent to which you knew or understood those views. Please, Mr. Cocke, don't tell us what you can see in other people's minds that was not expressed. If you do, please so state so we can be sure.

Mr. Williams: Are you talking about management of [fol. 16965] TWA, or board of directors?

Mr. Davis: A moment ago the witness referred to the fact this testimony was based on management.

Q. What do you mean by "management"?

A. Responsible officers of the corporation.

Q. Will you answer my question.

Mr. Davis: I don't know why there should be so much sensitivity. We are only getting the facts.

A. May I have the question read back, please?

(The question was read.)

A. Yes.

Q. When?

A. I don't recall just when. We continually reviewed the equipment requirements. At a later date we placed orders for more airplanes.

Q. Can you tell me approximately when, and the circumstances leading to that event? You certainly remember when you placed orders for more airplanes, don't you, Mr. Cocke?

A. Yes.

Q. When was that?

A. In 1961.

Q. Can you tell me when the operating officers or the senior officers of TWA reached a conclusion which reflects [fol. 16966] a change from your testimony I referred you to?

A. My recollection is it was when the decision was made to acquire Boeings instead of the 990s.

Mr. Williams: Is this exhibit in evidence, or has it been marked for identification?

Mr. Davis: I have referred to it by its docket number.

The Special Master: It is not in evidence.

Mr. Williams: It is not marked for identification?

The Special Master: No.

By Mr. Davis:

Q. Prior to that time, Mr. Cocke—

Mr. Williams: Prior to what time?

Mr. Davis: Prior to the time he just gave me in 1961, when a decision was made to acquire additional Boeings rather than Convair 990s.

A. All I am trying to point out was that the need for equipment is continually reviewed. The question of the 20 or 25 Convairs had not been finalized at this time, to my recollection.

Q. At this point I am referring to the economic use with benefits to TWA of 10 or 12 of the 707-331s. I would like you to stay on those for the moment. I understand [fol. 16967] your testimony to be that you were continuously reviewing TWA's needs.

Now I am asking you when subsequent to this testimony, if at any time, TWA management, that is, the senior operating people of TWA, reached a conclusion varying from the one that you were testifying to on October 1959.

A. I don't recall when it was.

Q. Do you recall any occasion for a change prior to what occurred in 1961?

A. I don't recall whether there was or wasn't.

Q. Then your answer refers to the Convair 880, where you state in effect that the matter is still under study.

In that sentence you say:

"The matter is still under study and we are continuously reviewing our needs as conditions change so that the exact number of Convair 880s has not been finally decided."

Is it a fact that subsequent to October 1959 TWA management continuously reviewed the needs relating to the exact number of Convair 880s that were needed?

Mr. Hupper: I object to the form of the question as calling for a conclusion of the witness as to how often or continuously this was done. If you ask him if they reviewed [fol. 16968] them from time to time, I will have no objection.

The Special Master: I will overrule the objection.

You may answer.

The Witness: Would you read the question, please?

(The question was read.)

A. Yes.

Q. Will you describe how that was done?

A. In reviewing schedule patterns, continuing market surveys.

Q. Can you tell me who participated in those studies or their evaluation?

A. I would say myself, Mr. Fellows, Mr. Rummel, and others.

Q. Did Mr. Thomas participate in that?

A. Yes, he would have participated.

Q. Am I still correct in understanding your testimony to be that you still have no recollection of further discussions relating to the 990s?

A. I don't recall any discussions.

Q. The next part of your answer reads:

"I would like to say in this concept that there is certainly [fol. 16969] nothing unusual in this, because from my knowledge of the action of other carriers who have placed large orders for these large jet airplanes many years ago, there have been a number of changes made in many carriers' orders."

Will you identify or describe what you were referring to in that part of your answer.

A. I don't recall specifically what examples I had in mind at that time.

Q. You continue to say:

"In fact, I don't know of any that haven't made some adjustments and changes in the numbers of airplanes they have ordered, or the types that they have ordered since the original orders were placed."

Was that a true statement at the time that you made it?

A. I believe it was.

Q. Since then have you obtained any knowledge or information indicating to you that you were in error in any way?

A. I have not.

Q. Let us continue with the questions and answers.

"Q. As I understand it, there are thirty 880s and twelve 707s for you on order.

[fol. 16970] "A. By the Hughes Tool Company.

"Q. By the Hughes Tool Company.

"A. That's correct.

"Q. Did I also understand that your latest thinking by TWA was that you would need only 20 of the 880s for your system?

"A. No, Mr. Grundman. I said it's under continual review. We looked at 30 airplanes. We looked at 20 airplanes. The question of how many we feel we require is still in the process of review. We haven't concluded it as yet."

Was that a correct answer at the time you gave it?

A. That is true.

Q. Was the matter still in the process of review?

A. It was.

Q. By whom?

A. By TWA management.

Q. Can you identify the persons involved in that activity?

A. The same people I referred to previously.

Q. "Q. I take it your opinion varies from time to time. What is your latest plan of operation as to the number of 880s that you will require?

"A. We have several plans.

[fol. 16971] "Q. In other words, depending on the amount of service you would provide over your routes, is that it?

"A. That's correct.

"Q. Pardon?

"A. That's correct.

Was that a correct statement of the facts at the time?

A. It was.

Q. TWA was an applicant for an additional route at that time?

A. We were applicants for the southern transcontinental route.

Q. Can you identify a little more clearly for the record just what that involved in terms of additional points to be served by TWA?

A. As I recollect, at New Orleans.

Q. From where?

A. From Miami.

Q. From Miami to New Orleans?

A. Tampa—Miami-Tampa to New Orleans. We were already serving Miami and Tampa. I believe our application if I remember it correctly, was New Orleans, Houston, El Passo to the West Coast.

[fol. 16972] Q. Los Angeles and San Francisco from that point?

A. Yes.

Q. For what period of time had this possibility of applying for these additional routes been under active consideration by TWA?

A. For several years at least.

Q. Was this hearing being conducted by the CAB for the purpose of determining which carriers were to be awarded these additional routes?

A. It was.

Q. As a result of these proceedings did TWA acquire the right to serve additional points?

A. It did not.

Q. Can you give me an idea of the amount of equipment which would have been required by TWA if its application for these additional routes had been granted by the CAB?

A. I don't recall how many airplanes were involved.

Q. In your answer you referred to several plans that you then had. Can you identify or describe these several plans?

A. No, I could not.

Q. Let me continue with your testimony. Mr. Cocke.

"Q. Of the 707s, as I understand it, all of those are of the long-range which you plan on using in the international [fol. 16973] service.

"A. Mr. Grundman, all 12 are 707-331s, better known, I believe, as the intercontinental jet. It's a long-legged, long-range big airplane. It in effect would be considered a system airplane for TWA. As far as our usage of those aircraft, they are basically international, a long-range airplane. Just exactly how they will be scheduled and what markets they will be in, I don't wish to divulge at the moment."

What in fact were your plans at that time for these 331s, Mr. Cocke? Let me ask you a preliminary question. I take it at that time you did not want to divulge it because of competition from other air carriers?

A. That's correct.

Q. Is there any reason now for not divulging what your plans then were?

A. Not if I could remember them.

Q. Do the best you can then and answer my question.

A. I don't recall what the plans were. It was a question of which gateways would be served directly to Europe.

Q. Did this Southern transcontinental route involve the possible need or use of these long-range 331s?

[fol. 16974] A. I don't recall the schedule pattern which would have used them in this area.

Q. Am I correct then in understanding you to say that the results of this southern transcontinental case would not have any material bearing or effect on TWA's needs for 331s?

Mr. Hupper: I object to the form of the question as calling for a conclusion of the witness.

The Special Master: Sustained.

By Mr. Davis:

Q. Let me refer you to your canned testimony, Mr. Cocke. Would you like to look at it for a moment?

A. Not if you will read it to me.

Q. This is the prepared testimony that you filed in that proceeding, and the question is:

"Q. You have previously stated that TWA will provide an all-jet service over the route it's seeking in this case. How many units of jet equipment will be required to operate the services shown in the initial schedule pattern?

"A. One Boeing 707 and eight Convair 880 aircraft."

Was that a correct statement of the facts as then planned by TWA?

A. Yes.

[fol. 16975] Q. In connection with this application for this southern transcontinental route, did it have prepared some proposed initial schedule of service to these points that you were seeking certification for?

A. I believe it did.

Q. This reference to one Boeing 707, can you tell me whether that referred to a 131 or a 331?

A. My recollection is that it referred to a 131.

Q. The next question was:

"Q. In other words, they can be used domestically too?

"A. Oh, yes, they can be a transcontinental non-stop airplane.

"Q. Are all of those aircraft available on lease to TWA when and as they are delivered?

"A. Mr. Grundman, there are many plans being considered which would make available to TWA all of the aircraft that it needs. As far as I know, no definite plan or negotiation has been concluded. I am confident, however, that TWA will obtain all of the aircraft that it needs just as it has in the past. We have got 15 Boeing 707s flying today. They are earning substantial profits. So I have no qualms or question or fear about the future as far as [fol. 16976] TWA's ability to obtain the aircraft that it needs."

Did that reflect the opinions that you then had, Mr. Cocke?

A. Yes.

Q. Did that opinion of yours change subsequent to the testimony you gave at that time?

A. Yes.

Q. When?

A. When we didn't get the delivery of the airplanes.

Q. Delivery of which airplanes?

A. The Convairs.

Q. Which Convairs are you referring to?

A. The 880s.

Q. Can you be a little more specific as to which 880s you did not get?

A. When the delivery was delayed.

Q. You refer now to a delay in delivery, and not to a failure to obtain the airplanes eventually?

A. That's correct.

Q. When did that occur?

Mr. Williams: When did what occur?

Q. This change of opinion by reason of delays.

A. When the airplanes weren't received as I had hoped they would be.

[fol. 16977] Q. My question is when?

A. When the delivery dates changed.

Q. Can you tell me when that was?

A. I believe in the fall of 1960, and 1961.

Mr. Hupper: Could I have the answer to that question read back?

(The answer was read.)

A. Let me reflect on that answer for a moment, if I may.

[fol. 16978] Q. Sure?

A. It would have been the fall of 1959 and during 1960.

Q. After we finish this, we will return to your diary, and at that time you will be able to point out what you are referring to now.

A. I may be able to.

Q. Let me continue with your testimony, Mr. Cocke. The next question reads as follows:

"Q. Hughes Tool has sold certain of these aircraft which it had on order to Pan American?

"A. I so testified.

"Q. Are the other aircraft available for sale to the other carriers, or are they reserved for first call by TWA?

"A. Mr. Grundman, as I said—and I mentioned the six Pan American airplanes—we have had our schedule patterns under continual review some time ago. We concluded that perhaps ten to twelve of the 707s with their early delivery dates would be sufficient for TWA to use economically on those early delivery dates and discussions were held with the Tool Company. The result, as I said in my testimony, is that six were sold to Pan American. I have [fol. 16979] also said as far as the Convair is concerned, that we have studied schedule patterns of thirty. We have studied schedule patterns of all there is in the range. I have no question in my mind that TWA will receive whatever aircraft it needs. You are asking a strictly technical question—are the orders assignable. The orders are assignable."

In that answer, Mr. Cocke, you refer to the conclusion that perhaps ten to twelve of the 331s would be sufficient for TWA to use economically, and "discussions were held with the Tool Company."

Can you identify the discussions with the Tool Company to which you were referring?

A. I would be referring to discussions that Mr. Thomas had with the Tool Company.

Q. Can you go a step further now and identify, or give me whatever knowledge or information you have which includes what you have been told, as to the discussions that Mr. Thomas had with the Tool Company?

A. I don't know anything about the discussions.

Q. Let me continue:

"Q. Hughes Tool, according to your understanding, did it order these aircraft with a market other than TWA in mind?

[fol. 16980] "A. I couldn't answer that question. I don't know."

Was that a true answer at that time, Mr. Cocke?

A. Yes. I didn't know whether the Tool Company had an idea of ordering these aircraft for a market other than TWA.

Q. Subsequent to that time have you acquired any knowledge or information of any kind whatever relating to the market for which those aircraft were intended?

A. I have not.

Q. Do you know of anyone at TWA who has any knowledge or information with respect to the market for which those aircraft were intended?

A. I do not.

Q. Let me continue:

"Q. Did I understand that ten of the 707s of the twelve would be sufficient for your present needs?

"A. I said ten to twelve.

"Q. Ten to twelve of the twelve that are on order?

"A. That's correct.

"Q. So that there might or might not be one surplus which would be available for your need on this proposed [fol. 16981] operation. You say you need one 707 for this operation, plus eight Convair 880s?

"A. Mr. Grundman, that is getting pretty precise in airplane numbers as to whether this one would be—if we don't need but eleven with our present routes and this one would serve Florida, I just couldn't get that precise.

"Q. As I understand it, the present equipment that Hughes Tool has on order are for present needs—not for this in mind at all?

"A. There is no question about that.

"Q. There may or may not be some of these aircraft available for this routing when, as and if it is authorized?

"A. I thought I made it clear in my testimony, Mr. Grundman, that the eight Convairs and the one Boeing to operate this service applied for in this proceeding are additional aircraft that will be required.

"Mr. Grundman: That is all I have. Thank you."

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[fol. 18170]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,
—against—
HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

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120 Broadway,
New York 5, New York

Transcript of Hearing—September 15, 1962

10:00 a.m.

Before: Hon. J. Lee Rankin, Special Master.

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[fol. 18268]

RULINGS BY SPECIAL MASTER ON MOTION TO EXAMINE MR. HUGHES

The Special Master: Do any other counsel wish to be heard?

Gentlemen, I am ready to rule on this matter. I have given careful consideration to all of the showings that the parties have made, the arguments, and for myself I am satisfied that there was authority for the service of the subpoena.

That the subpoena is binding upon Mr. Hughes, and as I construe the subpoena, it is binding upon Mr. Hughes to appear on September 24, 1962, or in the alternative, as fixed by the Court at any other time that the Court lawfully orders Mr. Hughes to appear in the courthouse at [fol. 18269] Los Angeles.

I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena, and its validity and whether it is an authorized act, and I advise and instruct counsel for the Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena, and that I will consider it an express waiver if he fails to communicate with the Court promptly and advise of any other construction of the subpoena. either as to its validity or when he should be required to appear, and if at any future time in this case Mr. Hughes should claim that the service of such subpoena was not authorized, not a valid instrument, not binding as I am construing it, I shall entertain a motion to strike the answer of the Hughes Tool Company and enter judgment against it in this proceeding.

* * * * * * *

[fol. 18353] The Special Master: I will incorporate in my direction to counsel for the Hughes Tool Company the order that, if Mr. Hughes does not accept the interpretation I place upon the subpoena, and the authority for service of that subpoena, and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week.

I am imposing that responsibility for giving that notice upon counsel for the Hughes Tool Company, because I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of authorization or [fol. 18354] failure to respond to the subpoena because of any such claims, either as to personal appearance when the Court would order, or as to the production of documents.

I am not directing that counsel obtain an answer from Mr. Hughes. If I don't receive one by Friday of next week, I have told you plainly, I hope, the construction I am placing upon the action in the failure to receive any, and the sanctions that are indicated as far as the Tool Company is concerned.

I do ask you to bear with me in giving that notice to Mr. Hughes, so there will be no question about his opportunity in view of his interests, both personally and in the Tool Company, to take exception to the interpretation placed by the Special Master on this matter, if he sees fit to do so.

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[fol. 18359]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

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120 Broadway,
New York 5, New York

Transcript of Hearing—October 25, 1962

10:00 a.m.

Before: Hon. J. Lee Rankin, Special Master.

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[fol. 18474]

RULING BY SPECIAL MASTER RE TWA'S OBJECTIONS TO TOOLCO'S INTERROGATORIES

The Special Master: Lady and Gentlemen, I am ready to rule on this matter.

I shall deny the motion to quash the interrogatories served by the defendant Hughes Tool Company on plaintiff dated October 11, 1962; and deny the order to strike the interrogatories.

[fol. 18475] I will give you my reasoning, for what it may be worth to you.

In the first place, I do not consider that there is any requirement to obtain leave from either the Special Master or the Court for the filing of the interrogatories. The rule does not require it, and I do not construe the order of Judge Metzner appointing the Special Master and providing for these proceedings to require any such permission.

In that regard, however, lest it be misunderstood, I do consider that the rules give the Court or the Special Master ample power to quash interrogatories or strike them or delay the day that they would have to be answered if they were to cause an unreasonable burden on any of the parties because of the fact that they have a responsibility of moving the case along by conducting the deposition proceedings or some other function in connection with the proceedings that are being conducted day by day.

I invited the application by any of the parties to this litigation to the Court for a proceeding under Rule 16 because I thought it would advance the entire litigation by eliminating issues that the parties did not think were in the case at this time or that they were not satisfied [fol. 18476] that they could produce evidence to support or for any other reason, and thereby direct our efforts in the taking of depositions to the issues that were important and confine the depositions to such issues as much as possible.

That matter, as Mr. Sonnett has said, is under consideration for determination by Judge Metzner at this time.

I consider each of these rules to be cumulative and independent, and that the whole purpose of the federal civil rules is to aid and assist the acquisition of information which will either support the claim or defense or show that there is nothing to support such claim or defense, and that they should be used by all of the parties, each of the rules, and all of them, as much as possible to get to the facts as promptly as possible so as to reduce the expense of the litigation and the time consumed by the parties, counsel and the court in the handling of the case.

I therefore think that the interrogatories are proper, that TWA could be of great assistance to the progress of the case by answering them promptly, that insofar as any of the answers eliminate or reduce the issues, or demonstrate ultimate facts that will support the claims, they [fol. 18477] will be of assistance in the conduct of this litigation.

I also think that it is important that the answers to the interrogatories be furnished so that the depositions from now until February 11th can be devoted to concentration on all of the matters that are not furnished by the answers to the interrogatories, and also confined to whatever issues can be refined out of the interrogatories and the answers.

It seems to me that it is the responsibility and duty of the Court and the Special Master, as an arm of the Court, to do what can be done to try to determine as explicitly as possible what issues there are in this case between the parties and what ultimate facts there are which will support those issues and what witnesses will be able to testify to them.

Those are the reasons for my ruling.

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[fol. 18548]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,
—against—
HOWARD R. HUGHES, HUGHES TOOL COMPANY
and RAYMOND M. HOLLIDAY, Defendants.

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120 Broadway,
New York 5, N. Y.

Transcript of Oral Argument—December 3, 1962

4:15 p.m.

Before: HON. J. LEE RANKIN, Special Master.

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[fol. 18588]

RULING BY SPECIAL MASTER RE TWA'S OBJECTIONS TO FURTHER INTERROGATORIES

Mr. Davis: I was hoping we were going to get a ruling as to whether I will get answers to interrogatories, and when.

That would certainly expedite all discovery so far as the Tool Company is concerned, including that of Mr. Leslie.

Mr. Sonnett: It seems to me it is about time TWA had a chance to a little discovery. You have been at it for about a year and a half.

Mr. Davis: I think it is time we knew what this complaint is about.

Mr. Sonnett: You have been able to characterize it as a fine complaint.

The Special Master: Mr. Davis, are you able to give any expression of how much more time you will take with Mr. Leslie on direct?

Mr. Davis: I have not given any more thought than what I indicated previously on the record. It would be my hope to complete Mr. Leslie in another week. I am obviously groping in the dark.

Now Mr. Sonnett says that this complaint which alleges a conspiracy going back to 1939, apparently I am in the wrong period.

If Mr. Sonnett would merely tell me in some fashion [fol. 18589] what is this conspiracy he is talking about, whether or not control of TWA was exercised in the manner in which he approves or disapproves, I could be a lot shorter.

At the moment the best I can do—I cannot say any more than I have already said.

The Special Master: I indicated to you then that I was not holding you to that estimate. I was only asking for your best estimate, and I still do the same.

If you can do it within the week of your estimate, fine. If you need some reasonably short time beyond that, we will deal with that. I am sure that time can be made available.

I think that gives a general idea as to the problem for those who have the cross-examination to look forward to.

I am ready to rule on this matter, but generally I would like to wait until the Court rules upon the interrogatories that are before it.

On the other hand, I have the problem that after considerable thought in this matter, I was trying to work out a schedule and timing, when I arrived at the February 11th date for setting Mr. Hughes' deposition in California, and to give the Tool Company a reasonable opportunity prior [fol. 18590] to that time to do certain things that I tried to indicate when I took that action.

Unless it would seriously discommode any of the parties, I would be disposed to have my ruling in this matter effective at the close of the day on December 21st, or if there is some indication that you would prefer it, so that it does not interfere as far as any review or appeal, the day before, if you so indicate to me—but I think I can now give you my reasoning so that you can be thinking about it, and I will enter the order on the record at that time with the idea of giving Judge Metzner an opportunity to act before I make any more error by that time, if he sees fit to do so.

I am disposed to overrule the objections to the interrogatories, and the motion to quash. As I have stated before, I conceive these rules to be cumulative, that their whole purpose is to try to arrive at the truth and litigation as rapidly as possible, and the opportunities presented by each of them separately and in combination for counsel to try to obtain this knowledge and truth about the position and contentions, and the evidence insofar as it can be [fol. 18591] reached by depositions, and to some extent by interrogatories, although I recognize the validity of Mr. Sonnett's claim that the defendant cannot reach into his briefcase and take out all the proof that he is going to make at the time of trial, and he is not required by the rules to lay it out before the defendant in that manner. But the essential facts underlying the complaint, I think, can be reached by interrogatories, and I think that is one of the purposes.

The objections are broad in terms, and they do not reach down, as I conceive the rules to require to be directed specifically to each objection where there is a ground for complaint against it.

As I understand the rules, it is conceived that if a party is objecting to a particular rule, and the burden it imposes upon him, and is therefore oppressive and harassment, that that objection should be directed to the particular interrogatory in specific terms, and in that regard I think the objections are defective.

On the other hand, the parties in this case, at least in my thinking, are spending large sums to have a Special Master here under the Court's direction, and one of the [fol. 18592] benefits, it seems to me, of having a Special Master should be to allow or provide for relief as we go along, against oppression and harassment as it develops in these proceedings.

If it can be shown, even though it is not shown in the objections themselves here, but can be shown by a further showing as to particular interrogatories that the burden is so great as to be unreasonable, and that a greater period of time is necessary for certain of the answers to be developed, I make the ruling with the provision that it is subject to the reservation in TWA to produce before the Special Master at a later date convenient to the parties such showing as it is able to make with regard to any of such interrogatories.

That the burden would take a period of months or some time that would be oppressive and unreasonable, and that they should be granted such reasonable time to allow them to develop the answers to the interrogatories, as to such specific questions where such a showing is made.

With regard to the statement that these answers might furnish the basis for motion to dismiss and dispose of the action, I have indicated before in this case, as Judge [fol. 18593] Metzner has, as I read the record, that there are serious questions as to whether or not a case of this kind can be disposed of in that manner before a reasonable discovery is had by the parties.

I have also indicated that I think the question of the jurisdiction of the Court is separate and apart from that.

But how it could be raised and how it could be developed is a problem separate and apart from the responsibilities of the Special Master, as I see it.

On the other hand, in the answering of these interrogatories it seems to me that there could be a compliance with the rules by indicating the knowledge to the extent that the plaintiff has it, of the various facts supporting its complaint, but also that certain information is in the hands of Mr. Hughes or other sources, and can only be obtained upon the discovery processes being made available to TWA in the development of the case.

That would have a bearing upon the question of whether there could be any dismissal of the case prior to the time that the party had an opportunity to develop those facts.

I have examined all of the interrogatories, the objec- [fol. 18594] tions in detail. I have read all the cases cited by the parties, the briefs presented to the Court, as well as the arguments here, and that is my analysis of the situation.

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[fol. 18781]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY
and RAYMOND M. HOLLIDAY, Defendants.

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120 Broadway,
New York 5, N. Y.

Transcript of Hearing—January 17, 1963

Before: HON. J. LEE RANKIN, Special Master.

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[fol. 18791] Mr. Barr: Mr. Special Master, we have brought on this morning before you a Rule 34 motion. There is attached to that motion an affidavit of Mr. John R. Hupper, and a schedule.

[fol. 18792] I believe that the affidavit of Mr. Hupper shows ample good cause under the rules, and that it is more good cause for the production of documents than has ever been shown in this case before.

I don't see any point in rehashing everything that is in there. I am prepared to answer questions that you might have in whatever detail will satisfy you with respect to any of the items or with respect to the motion as such.

Unless you do have some questions, I don't think I would serve any purpose in taking up everybody's time by arguing.

The Special Master: I would like to hear, Mr. Barr, what you have to say about the need of having such material at this time in light of the fact that Mr. Hughes' deposition has been set for February 11th, and also in light of the position of Mr. Davis that he has this motion to dismiss, and therefore there is a conflict, the problem being how you are to prepare without it, and try to meet this date, and so forth.

Mr. Barr: The point of my remarks before, sir, was this: I don't believe, indeed, I am sure that there is no con- [fol. 18793] flict between the fact that Mr. Davis finally is going to make his motion, and the fact that Mr. Hughes is going to be deposed on February 11th.

The Court has fixed the 11th of February as the date for the examination of Mr. Hughes, and has expressed no intention of deviating from that date.

It is my understanding that whether or not in fact such a motion ever comes on, the deposition of Mr. Hughes will proceed on February 11th.

It is in that context that I make these remarks.

Let me further say that even if the deposition of Mr. Hughes should be postponed for a brief period of time, for any reason, and there may be many—I am not undertaking to guarantee that Mr. Hughes will appear on the 11th of February—but that is the date that we now all must point to in our preparation, and there can certainly be no dispute about that.

It is perfectly clear, in addition, that whatever happens to Mr. Davis' motion, that the additional defendants have a right to examine fully Mr. Hughes, and it is for that purpose that we particularly need these documents now.

The nature of the problem described in Mr. Hupper's [fol. 18794] affidavit is one which we have been able to develop only within the last month or so. This is so because, as you know, the volume of documents produced by all parties is very voluminous, and we have had a terrific problem of organizing those documents.

But as is so often the case when you get documents put in chronological order, they begin to tell a very interesting story, and this is part of the story that the documents reveal.

We feel very strongly that we need all of this information for the examination of Mr. Hughes, and for whatever other purpose they may be useful to us in the prosecution of this case.

I think clearly without these documents our examination of Mr. Hughes would be incomplete. If Mr. Davis is going to follow his usual tactic of delaying as long as possible every proper discovery motion that we made, then the result may very well be to prolong Mr. Hughes' deposition, because we intend to have these documents before we complete Mr. Hughes' examination, and we intend to have an adequate amount of time to analyze those documents.

Whatever acts Mr. Davis chooses to take to delay us [fol. 18795] in getting our hands on these documents will be upon his shoulders, and whatever success he has in delaying us in obtaining the documents will be his responsibility.

I don't have any desire to stay in California for any particularly long period of time, but if Mr. Davis is going to resist this and other efforts to get at the facts, then we are going to have a very difficult time examining Mr. Hughes. It is going to be longer than it need be.

I think in many respects, sir, that Mr. Hughes will be the only person who can testify as to whether or not these various factors described in Mr. Hupper's affidavit were the things that motivated him in making a decision for the Tool Company over this period of time.

We are confident they are, but there is no other person who can say whether Mr. Hughes was motivated by these reasons, these tax reasons, and that is the particular reason why we need these documents to examine Mr. Hughes.

The Special Master: Mr. Barr, have you made a sufficient examination of the documentary evidence that has been produced for your client's examination up to date, [fol. 18796] so that you can state for the record whether or not this material is now available to you in any of those documents?

Mr. Barr: I can certainly say this, sir, that obviously some of the material is available to us in the tax returns and the financial statements that have been furnished to us.

I can also say with complete confidence that we do not have the whole story and we know we don't have the whole story.

Obviously, financial statements and tax returns are the final product of a large mass of work. It is this underlying data, if you will, and the things relating to it that really explain the bare figures filled in the various blanks in the financial statements and tax returns.

Insofar as I know—and, if I don't, I don't think anybody does—we do not have the basic financial data of the Tool Company, and the other information that is called for in this document.

I would certainly, if in any instance here it appears that we have been furnished with a portion of the information, I want to make it perfectly clear that I am not asking that that information be furnished again. There may very [fol. 18797] well be certain documents that might be called for in this schedule which have already been produced, and I don't ask for those.

However, this schedule is designed to focus the attention of the people who are searching for documents on the particular kinds of things that we are interested in, and the things called for in here are not the things that were previously called for in the prior schedule.

The Special Master: I take it that your statement is that you are able to reconstruct and conclude certain probabilities from materials that have been furnished you, but you are seeking certain work papers and basic documents so as to be able to confirm those reconstructions and conclusions; is that right?

Mr. Barr: That is partially correct, sir. We have found in certain transactions a pattern which we believe was very likely followed in all transactions. From the information that we have, we are not able to verify that with respect to each transaction.

As you just said, in order to verify our conclusions with respect to the transactions that we now know something [fol. 18798] about, we need this further information.

Also, very probably we will need to have this information in order to refresh Mr. Hughes' recollection, or the recollection of other people.

The Special Master: Mr. Sonnett.

Mr. Sonnett: Mr. Special Master, TWA joins in the motion made by Equitable and Metropolitan, and I would like briefly to present some additional reasons why we think we need the production of the documents sought, and need that production promptly.

I am not going to attempt to repeat to you what Judge Metzner said yesterday, of what he will say for the record in his formal decision which will be entered today; you will have that and give it whatever weight it deserves to be given.

However, I think it is fair to say that Mr. Davis' motion with respect to which he asked confidential treatment, and which was the subject matter of the pretrial conference in chambers yesterday, was denied orally by Judge Metzner in all respects, including the requests for stays of various kinds.

Judge Metzner said on the subject of the motion to dismiss, "I cannot prevent you from bringing it on. I have [fol. 18799] indicated my views. If you wish to bring it on, I will pick a date and set it down. I will look at your papers, which you will have filed before February 1st.

"TWA can have a week in which to file whatever it wants to file.

"After looking at your papers, if I find that it raises any question in my mind which requires further consideration, I will postpone the deposition of Mr. Hughes for one week while I decide your motion."

But he quite plainly indicated, as he has said in his order, that Mr. Davis has been trying to get changed, the deposition of Mr. Hughes will be of great assistance in determining the very motion Mr. Davis is seeking to press on the Court.

The evidence with respect to the tax motivation of Hughes is critical in this case. It is also critical with respect to the motion that Mr. Davis wants to bring on, because it is that which explains why it was Hughes did what he did do, and how he did it.

I am not going to engage in speculation about it. I am going to refer briefly, if I may, to three pieces of paper, two of which are statements by Mr. Hughes himself on [fol. 18800] this subject, which are related intimately, and which are at the heart of our case, and one of which was a statement by his former chief lieutenant for many years, Mr. Noah Dietrich.

I think these alone make evident an acute need for the tax documents promptly to prepare for the Hughes deposition.

The first, which is a foundation document of critical importance in the case and a causation of the injury to TWA, is a call sheet of a telephone message which Hughes dictated on October 28, 1960, at 2:00 p.m., to be given to Mr. William A. Forrester.

The message was as follows:

"Call him back and tell him that for his information that Charlie Thomas negotiated and developed a deal with Dillon, Read financing plan without my authority or encouragement from me. He forced it down my throat then at a board meeting, at which time he created a coalition of my directors and turned them against me, and faced me with a mass resignation of all but one of the TWA directors.

"I have never liked this plan. I have never been in favor of this plan. I have fought it from the very beginning, and I am still fighting it, and I assure you that if it is [fol. 18801] employed, it will be over my dead body.

"And if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon, Read program, I would be most grateful.

"It is very flattering for you to say that you don't think I have ever been forced to do anything, and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today, and has not been true concerning this Dillon, Read program from its inception.

"I have fought it hammer and tong from the very first day I ever heard of it."

With that in mind, a telephone conversation between Mr. Hughes and Mr. Carver of the Bank of America, not long thereafter, on December 4, 1960—

Mr. Davis: Will counsel identify the documents?

Mr. Sonnett: Yes, I will. If you give me a chance I will identify them fully for you.

I have before me and will be happy to have marked as an exhibit, a copy of the handwritten notes dated 12/4/1960, of Mr. Carver of Bank of America, produced by them. [fol. 18802] The notes start out by saying "HRH called 8:45. Was at breakfast. He will call later. 9:30. Called to thank me for kindness and patience and faithfulness per our talk, et cetera. DR plan has been a bitter pill from the start, et cetera."

If goes on. This goes on for a total of five pages.

In the course of this conversation which Mr. Carver, who kept very careful notes, noted ended at 10:55, so they talked from 9:30 to 10:55.

At page 3 of these notes it states as follows:

"Three things came to HRH attention this weekend—anti DR.

"1. 102 tax situation—it's real bad, and three weeks before year end. M.L. is better. Have a board of directors and only need to get one man (Nixon?), so he would have to set up at once to refinance.

"2. Very confidential—will be a bill produced and will pass government financing of airlines similar to feeder line financing.

"3. Another tax matter."

In respect of Mr. Noah Dietrich, two days later, on the [fol. 18803] 6th of December 1960, Mr. Dietrich called the Bank of America. I read handwritten notes dated 12/6/60, produced by the Bank of America.

Mr. Dietrich, according to these notes, at page 1, said as follows:

"1:45 p.m. Noah Dietrich called.

"Powerful but unselfish group has called in Noah to enlist his support to represent minority stockholders.

"HRH got control in 1939—no dividends since, and no appreciation as of today—American—United; et cetera. Av."—which I take it means "average"—"6 per cent appreciation—what causes it? HRH is basic factor—stooge board of directors and policy controlled by him. His efforts to defeat 102 problem he had to have a majority of the board. These are professionals in this sort of thing—stockholders' derivative suit."

The trails are pretty clear. We do need the other documents referred to in this motion to meet the burden of proof on us for establishing the—they are at the heart of the acts which Hughes committed—all outside the scope of the Civil Aeronautics Board.

[fol. 18804] I think our need is acute. These things do take time. I think you will find in the decision which Judge Metzner enters today that the February 11th date is a real date. He has given Mr. Davis or Mr. Hughes the option to suggest a place other than the courthouse, if that is their wish, and requested him to advise us what their wish is.

We have said that we would work out any reasonable arrangement that you approved, and that you would be there to supervise it and that problem could be taken care of adequately.

To assemble the documents will take Hughes Tool Company some time. For us to analyze them, prepare them and use them in the Hughes deposition will take some time. We should have them, and we should have them promptly.

Th Special Master: Before I hear from Mr. Davis, I would like to know what other defendants are joining in the motion?

Mr. Chanler: Mr. Special Master, I would like to join in the motion on behalf of the Irving Trust and Sessel. I would like to ask that these papers also be made available to us, and perhaps in view of your questions to Mr. Barr as to the need for these documents, I might amplify [fol. 18805] a little bit what he said.

I originated the search into this tax question, because when I got into the case last summer, I remember that during 1959 and 1960 and 1961, my partner, Alston Choate was then representing the banks, told me they couldn't make any agreement with Mr. Hughes because of his 102 tax problem. So I asked what they know about it.

At that time, with 1,700,000 documents to make a special search of, and I had my tax partner cleared. He made a study of it and told me what he had found, apart from what is reflected in this affidavit, that all these delays and insistence upon leasing plans, and so forth were undertaken by Mr. Hughes for Toolco's tax advantages, and it seemed to me that completely sustained our principal defense, that the lending institutions had to have a voting trust because you cannot lend to a corporation that is controlled by a man who is manipulating the corporation's affairs for his personal tax benefits.

I asked him whether he was able from these tax returns, whether we could prove all of these facts, and he said "I think I can prove it to a tax lawyer." I said, "I am confused because I am not a tax lawyer. What more do we [fol. 18806] need?"

He said, "I have given you this on what I call circumstantial evidence. It is obvious to me that looking at the returns, this is what happened." He said, "In order to get direct evidence, we need a lot of additional documents."

Those are the documents we are now asking for. They are necessary to present that defense, and necessary also, as Mr. Sonnett has said, for TWA's presentation of its case. We ought to have them promptly, because the Special Master has made it quite clear that Hughes' examination is going on.

As Mr. Sonnett said, all he said about Mr. Davis' motion, if on February 1st Mr. Davis produced anything new that made him change his views, then he would extend it for one week.

Under those circumstances it is absolutely essential we get these documents and get ourselves prepared to go ahead with the presentation of our defense, and TWA's presentation of its affirmative case.

The Special Master: Mr. Bradner?

Mr. Bradner: Mr. Special Master, I don't think I have anything to add to the very excellent presentation made by Mr. Barr and Mr. Sonnett and Mr. Chanler.

[fol. 18807] On behalf of Dillon, Read, we do wish to join in the motion and wish to obtain copies of any documents which you may see fit to order be produced.

Mr. Harrell: We similarly join in this motion.

* * * * * * *

[fol. 18819] Mr. Chanler: Mr. Special Master, in view of Mr. Davis' statements that he doesn't understand how the course of conduct are relevant—I think it is appropriate at this time to address myself briefly to that point. There is a lot more to it than the 102 problem.

From the start it was pretty apparent that Toolco needed an outlet for its fund. Until 1954 Toolco used TWA for this purpose to the extent of purchasing planes for TWA, and then of course having the business reason for spending its money to purchase the planes and helping finance TWA, and until 1954 or 1955, as has been frequently testified to here before you, Toolco was meticulous to see that all these transactions were done meticulously at cost.

In 1954 the first serious variance from this came. You will recall that Mr. Rummel testified that Hughes insisted that the contract for the 25 Constellations be signed on the 24th of December, although Mr. Rummel said the contract [fol. 18820] wasn't ready, the specifications weren't ready, and he didn't want the planes anyhow for TWA. Hughes insisted on it.

The financial statement of Toolco show that at that time Toolco had some $50 million of cash, which would have been subject to 102 penalties—$17 million, in fact went right away on the down payment for these Constellations, and the obligation to finance the rest of the Constellations. I think the HMI came in then too.

In 1955 a totally different tax angle came in—other tax angles Mr. Sonnett read about. In 1954 the provision for accelerated depreciation was enacted.

Also in 1951, the 102 statute had been amended so that capital gains, as distinct from income, were exempt from the 102 penalty. They could be accumulated.

In 1955 the Commission of Internal Revenue issued some regulations regarding how you could take accelerated depreciation. He said a lease of property will be deemed a conditional sale, and not a lease, if the rent and any option to purchase is so designed that the lessor or seller recovers only his cost plus carrying charges.

[fol. 18821] You will recall that in all the early, whatever has been testified repeatedly—in all these conditional sales contract which they had, which I think Leslie said were like a lease, they were always done on the basis of cost plus carrying charge.

If they were going to take accelerated depreciation they had to have a bona fide lease. They had to lease them at a profit and sell them at a profit, and obviously they couldn't do it at all if TWA could finance itself.

In 1956, I think it is already testified here, Mr. Leslie was talking to the lending institutions, insurance companies, about financing the jet program, and Mr. Hughes told him to stop and leave it to him, and nothing was done.

Toolco ordered jets, and wouldn't do anything about financing them, wouldn't do anything about permitting TWA to finance them.

In 1959 came the Read plans—which would permit TWA to finance them, one that went through December 30, 1960, two years later, and then there was this leasing plan. Mr. Hughes came out and said he wanted a leasing plan that enabled Toolco to keep ownership of these planes so he could take accelerated depreciation, and he wanted it [fol. 18822] done so he could show a profit.

Mr. Thomas, then president, said that wouldn't get by the CAB. The Equitable Life Assurance said they wouldn't accept that because TWA should own its own planes. Everybody insisted that some sensible financing plan should be gotten up.

For two years Mr. Hughes refused to allow any sensible financing plan to come. He kept insisting that if possible there should be some leasing arrangement. He was turned down on the leasing arrangement.

What now appears from studying these documents and reasoning from what we see actually happen, is that all the time everybody was wrangling about what kind of financing plan we were going to have, Hughes was in fact operating the very kind of leasing plan he had asked Dillon, Read to prepare, but that everybody had refused to let him put into effect, because by these interim leases, when the interim leases were entered into, everybody thought they were just ad hoc short term proposition.

Everybody assumed for 1959 there would have to be financing. They were done on a $2500 a day for the 131, and $2900 for the 331s.

[fol. 18823] Mr. Zeller: $25,000 a day profit.

Mr. Chanler: None of them had a provision that had been put in when they leased the KLM planes waiting until a financing plan could be put into effect, which said any rent would go to the purchase price—there was nothing like that in it.

In the last minute, as we know, after attempting to prevent the closing on the 29th and 30th of December, when the closing took place, while the purchase price sounded all right, Toolco's cost plus carrying charges, less straight line depreciation, then the next item (b) said accumulated rent, $25 million.

Everybody was determined to get a financing plan through and some planes, because Toolco's effort—they had been merely bankrupt in the autumn, and was in default on its debts, and couldn't finance the 880s, and had to go through in a hurry, and it did.

When you look at the tax curve, you will find that Toolco in its turn claimed $22 million of capital gains, consisting of the accumulated rent of $25 million, less a straight line depreciation, which was only $12 million, $13 million profit.

* * * * * * *

[fol. 18825] The Special Master: They have $11,700,000, I think, on the renting of these planes, and then they also capitalized the accumulated carrying charges or interest of 5½ per cent, made another $12 million of capital gains, so they converted $22 million of income into capital gains.

They couldn't have done that if they had gone ahead with a sensible and proper financing plan in 1959. They had to delay.

I say one of our defenses will be that all this talk—you couldn't get Mr. Hughes, he didn't know what he was doing—he knew very well what he was doing. He was making $22 million every day he delayed the closing. That is a complete defense to any charge that the lending institutions were in any way at fault in insisting with that kind of behavior for him, that there should be a voting trust.

They don't know all the facts we know now, but they knew Hughes was causing this delay. That he was unwilling to engage in any proper financing in order to give himself tax advantage.

All we can do now is to prove they were 100 per cent right.

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[fol. 19767]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 24

DILLON, READ & CO. INC.
46 William Street
New York 5

May 15, 1961

Mr. Charles C. Tillinghast, Jr.
President
Trans World Airlines, Inc.
380 Madison Avenue
New York, N. Y.

Dear Mr. Tillinghast:

At your request, we confirm to you the advice we gave you at our meeting last Friday.

You informed us that Trans World Airlines, Inc. has been requested to delay the consummation of the offering of the $111,235,900 6½% Subordinated Income Debentures due June 1, 1978 to its stockholders in order to permit Hughes Tool Company to make arrangements for re-offering the portion of these Debentures to be purchased by it. As an inducement, we understand Hughes Tool Company would agree to purchase the entire amount rather than the $100,000,000 principal amount which they are presently obligated to purchase, and the firms who would underwrite the sale of the Debentures for Hughes Tool Company would agree to endeavor to obtain wide public distribution of the Debentures.

We confirm to you that after consideration of the facts we have advised you that we believe a postponement of the offering would not be in the best interests of TWA because it might well have a detrimental effect on the completion of the $147,000,000 in financing necessary to purchase new equipment. We do not believe that the inducement offered would adequately compensate TWA for the risk entailed in this delay.

We see no reason why the offering of the Debentures to the stockholders and the resale by the largest stockholder, [fol. 19768] if it decides to re-sell them, would have to be handled as one transaction. If the delay is requested to permit the prospective underwriters to make an investigation of the Company and the registration statement, we would say that in view of the complexities of the situation and the many aspects of its business which we know of, it would be absurd to believe that this could be done in one week or even two weeks and that therefore compliance with their request would entail a series of requests for longer delays. We point out that, under TWA's agreement with Hughes Tool Company, TWA is obligated to make the offer of the Subordinated Debentures before May 31st and that this time schedule has been a part of the overall financing schedule. Any unjustified delay in the schedule which is the basis on which the $147,000,000 financing has been arranged, in our opinion entails a risk to the completion of this plan.

Since our meeting, we have discussed this matter with Lazard Freres and Lehman Brothers who have advised us that they are in accord with the above advice.

Very truly yours,

Dillion, Read & Co. Inc.
by /s/ F. H. Brandi
President

[fol. 19864]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 37

Conference between

HUGHES TOOL COMPANY

and

TRANS WORLD AIRLINES, INC.

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380 Madison Avenue,
New York 17, N. Y.
June 2, 1961,
2:30 p.m.

* * * * * * *

[fol. 19900] Mr. Davis: In connection with that matter, I believe you all have been aware of the fact that there are currently four 880's with TWA cockpit configuration, which could be made available to TWA as early as August—one in August and one in September of this year.

Incidentally, one of the reasons I thought it would be desirable to have this transcript, because of the rapidity with [fol. 19901] which I got information, if I make a mistake I will see it on re-reading it. I will try to have somebody review this. It is my understanding that had you continued with the Convair jet program, there would be four 880-Ms, which would be likewise available to you at this earlier date, namely, August and September of this year.

It always has been our understanding, and a problem which I think everybody has recognized, that the earliest possible delivery of the greatest number of jets is about the most beneficial thing that could happen to TWA.

I would like to add one more thing which is something that perhaps experts in TWA might want to do a little figuring on, but this speed advantage that the 990 has over the 131 has more significance than merely the fact that the traveling public responds favorably to the mere advertising of operating a faster aircraft—a faster jet.

We believe that they go for the mere fact that you are faster, being able to say that you have the fastest, but we think there are some economic, and very important economic advantages, that go well beyond that aspect of it. [fol. 19902] I don't know what you can assume as being the speed advantage that the 990 has over the 131. See if you can find it in here for me. For the purposes of one type of computation, and using, of course, the Boeing, the 131 in use by American, which is the certified one, I would imagine there would be a speed advantage of at least 25 miles an hour. I don't know how close that is. I have also been told that the 131-B's that you would be likely to receive from Boeing, because they have a more modern version of the same engine or something, might have narrowed that gap to some extent.

Mr. Tillinghast: I understand you to say that you assume but do not know.

Mr. Davis: I understand as a fact that the 990 is a faster jet than the Boeing 131, including the one that TWA contemplates in this Boeing deal. What I cannot state as a fact is the extent of that speed advantage.

Mr. Tillinghast: Okay.

Mr. Davis: I understand that the speed advantage of the 990 over the current Boeing in service is at least 25 miles per hour. In fairness, I didn't want to be comparing apples and pears. There is a possibility, as I understand it, that [fol. 19903] speed advantage may be narrowed by this 131-B, at the expense, however, of getting greater speed by using more powerful engines and greater fuel consumption. That is what I am going to go to in just a moment. But I do understand as a fact that whatever the new Boeing may try to do in narrowing that speed advantage that the 990 has, that the Convair 990 will still be faster.

I appreciate that there are more things than that that go into it economically, because there are more seats in the Boeings than in the Convair 990.

Assuming a 60 per cent first-class load factor—and I believe using the figure 60 per cent is a fair load factor to use —and recognizing that in the first-class configuration the

990 would have 57 seats available against the Boeing having 59 seats, over the period of the next ten years on the basis of 26 aircraft, and on the assumption of a 25-mile per hour speed advantage, during the ten-year period, TWA would receive $35 million of additional revenues.

Now, let me assume that the 131-B narrows that speed advantage. I indicated before, as I understand it, it is at [fol. 19904] the expense of increased costs in operation, and what is given to me as a fact, which I believe I can support by appropriate schedules and detailed information, if given an opportunity to do so, is this:

Using now maximum cruising power and normal airline operating altitudes and now assuming that the speed differential between the 990 and the Boeing is reduced down to approximately ten miles per hour—in other words, that the speed advantage of the 990 is only ten miles per hour greater than the Boeing 131-B with the souped-up engine or whatever it is that makes the new one go a little faster, possibly, than the existing one—the economic advantage in revenue production of the first ten years' life of a fleet of twenty-six 990s and twenty-six Boeings is on the order of $51 million.

I am referring to first-class configuration usefulness.

Now, if we take the coat configuration, and assuming an average passenger load of 70 passengers for each aircraft, the revenue advantage, on the basis I have just been describing over the same period, of the 990 over the Boeing is $84 million. I am told that what I have just said can be [fol. 19905] accurately stated in another way by saying that this advantage is that the 990 would produce the same revenue with an average load of 68 coach passengers as compared to 75 coach passengers on the 707.

Mr. Davis: Off the record.

(Discussion off the record.)

Mr. Davis: One additional fact which I don't believe was known or has been known to TWA is that this 990—that Convair has established the ability of the 990 to land with full reserve fuel load and a full complement of passengers and cargo on a wet runway in not more than 6000 feet, which means that it would be able to land at the LaGuardia instrument runway which is now, as I understand, planned for lengthening to 6000 feet, and that this characteristic has enormous commercial attractiveness with respect to a very important service area. I understand that this ability to land on a 6000-foot runway is based on the TWA requirements, and not the CAB or FAA requirements. I assume, without knowing particularly that there are or may be a comparable advantage in areas other than New York where the importance of being able to utilize a 6000-foot runway would be of great importance.

[fol. 19906] Mr. Rummel: May I ask which TWA requirement you are referring to?

Mr. Davis: I am told that the landing requirements of an aircraft must not only meet the governmental requirements, but also must meet with what oftentimes are more stringent requirements of the operational procedures and requirements of various airlines, and when this information was first furnished to me, I asked that it be confirmed as to whether or not they were speaking of meeting the TWA requirements, and I was told that the statement I have just made would be accurate as applied to TWA requirements.

I assume you understand this better than I do.

Mr. Rummel: Well, that is, I wanted to know what requirements you are talking about.

Mr. Collier: It would be the TWA operational requirements, whatever they may be.

Mr. Davis: For landing with fuel reserve and a full load of passengers on a wet runway..

Mr. Reed: Six thousand feet long.

Mr. Davis: Some of the reasons why the Tool Company [fol. 19907] before this management took over had decided on the Convair equipment as the best equipment to be utilized by TWA, relates to what we believe to be the result of having a more modern aircraft.

By that, I mean one that has been designed more recently, utilizing improved techniques. I understand, for example, that the 990 can be refueled at a rate of 300 gallons per minute, against approximately 234 gallons per minute for the 707, which I understand to be a real advantage on ground-time or turn-around time, but there are other technical advantages which I am sure are not new to those of the TWA staff who had previously considered the merits of the 990.

There is one aspect which I understand is of extreme importance, particularly by reason of a recent development, and I am relating to something that has to do with the use of this Scotch-weld fuel tank, which is an exclusive of Convair, and which apparently eliminates some corrosive action problem that other types of fuel tanks in jets have encountered and are encountering—

It has been explained to me that jet fuel creates a sort of [fol. 19908] a fungus growth in some of these tanks, and that the Air Force with some of the more modern jet fighters have insisted with Lockheed that this Scotch-weld fuel tank be used.

I would like to call it to your attention, if it has not already come to your attention, that in the May 11th issue of the Aviation Daily, the following appears; and I'll quote it:

> "The Air Force disclosed that it is asking for in 1962 funds of $671,900,000 for modification of its existing aircraft. The largest single share of the request, $260,000,000, is earmarked for modification of the B-52 series, according to information filed with the Senate Armed Services Committee.
>
> "Air Force Chief of Staff Thomas White told the committee that the Air Force has had to order two or three major modifications as a result of cracks in the B-52 structure. 'We anticipate that even more serious things might occur in the future. This more particularly with the G's and H's.'
>
> "He said in testimony released today use of the B-52 on continuous airborne alert has been given the Air Force [fol. 19909] cause for concern."

Now, I am told, and I believe the source of my information—which I think can be substantiated if it is of interest to you gentlemen—that the development of a weakness over a period of time in the wings of this B-52 series is in part due, if not largely due, to this corrosive action referred to, which I understand is eliminated by this Scotch-weld fuel tank which is available in the Convair equipment, and, as I understand it, only in the Convair equipment because it is covered by some patents, I believe.

It is also available, of course, in government or Air Force jet aircraft.

Mr. Davis: Off the record.

(Discussion off the record.)

Mr. Rowe: Why don't you continue, Chester?

Mr. Davis: And as I understand it, the government is insisting on the Scotch-weld type of fuel tank.

It may well be that you gentlemen have given full consideration to the pros and cons relating to relative passenger comfort being the Boeing and the Convair 990, and therefore perhaps the views held by my client in this regard [fol. 19910] would not be considered by you as new information, except possibly the reasons for those views.

We believe that the five-abreast coach seating as against the six-abreast coach seating contemplated in the Boeing configuration is a real plus for the Convair 990, because not only are the seats more comfortable, but there is always a possibility in a coach configuration of five seats of having two seats, so we believe that passenger acceptance of a five-seat coach arrangement will produce a higher load factor than the six-seat arrangement.

The coach seats on the 990 would be wider, and therefore more comfortable. I also understand, but I would be in a very technical area, that primarily because it is a more modernly designed aircraft, that the 990 has a lower internal or external noise level and that it has a more evenly distributed cabin temperature.

At this point I am in an area where I am stating something which I believe can be substantiated by persons better qualified than I am to go into that kind of a subject.

[fol. 19911] We do believe, and feel very strongly, that your maintenance costs on a 990 will be substantially lower than in the Boeing aircraft, at least Hughes Tool Company believes that this lower maintenance cost is due to the designed-in features of the Convair aircraft, and again which relates to the fact that we are talking about a more modern aircraft.

Basically, what I am saying at this point is that the Tool Company believes that this aircraft, which is the result of the product of much more recent design developments than what is basically the conversion or adaptation of a much earlier designed aircraft, and that even if you are thinking in terms of the possibility of going into the much later delivery of the so-called 727, that it will not compare favorably with the 990, either as to reliability or flexibility of use and operation, in that the 990 does present an aircraft which will be useful for a long haul, coast to coast haul, as well as your intermediate and short hauls, which will give you greater flexibility in operation, and relieves the longer range Boeings, which are now being used on domestic lines, to throw in to your international [fol. 19912] routes during the peak of your summer season when your international traffic is greater.

I don't think it is necessary, although material furnished to me for presentation today includes a number of items which I regard primarily in the area of technical differences which presumably have been fully considered by some staff level of TWA.

If you are interested in them, I could list some of them.

Mr. Rowe: I suggest you list them.

Mr. Davis: Would you like me to list them?

Mr. Tillinghast: May I break in here, Mr. Davis, because unfortunately I have to leave to keep a prior appointment. I just want to say one thing, ask one request of you, and that is that if the Hughes Tool Company is at all serious about making these planes available to TWA, would you be good enough to give us a specific, definite written statement of the terms on which they would be available, including the question of whether or not Hughes Tool Company would be willing in effect to give us a delivery bond and pay us a penalty for every week of delay [fol. 19913] from the deliveries which you state.

Could you do that for us?

Mr. Davis: Yes. May I clarify one point in my mind? Are you suggesting the Tool Company should bond the delivery by Convair, or are you referring to delays other than delays that Convair might have?

Mr. Tillinghast: Delays of either Convair or the Tool Company.

Mr. Davis: I'll take that request into consideration.

Mr. Tillinghast: You see, up to this moment in time, we have never had anything more than a statement that these might be made available to us, and if we are seriously to consider these, we need a specific statement of the terms on which they would be available.

Mr. Davis: I think it is a very reasonable request.

Mr. Tillinghast: Yes, otherwise, all we are talking about is irrelevant, because unless we know when we can have them and the terms on which we can have them and have [fol. 19914] a definite proposition on it, all the rest is completely irrelevant.

Mr. Davis: I appreciate there is no point of considering the possibility of getting jet aircraft which are not going to be available to you.

Mr. Tillinghast: You understand our position?

Mr. Davis: Certainly. I can state today that the Convair aircraft are going to be made available to you. I think we should sit down and discuss what would be a fair term.

I understand that there is a long-standing practice regarding the terms on which aircraft are made available to TWA. If you are talking of the financial arrangements that have to be made to pay for these Convairs, I think we are entering into a different area, which I think should be discussed and explored.

Part of the things I want to call to your attention are problems which come perhaps more into a legal area. At any rate the financing that is described in the current prospectus causes us some serious problems. We would be opposed to certain terms of a financing whether it be for Boeing or for Convair equipment. There is always a question as to financing by TWA, but assuming that the financ- [fol. 19915] ing terms, whatever they may be, are terms which do not adversely affect the very substantial interest that my client has in TWA, or the voting trust, then we may assume that the same financing would be equally available to finance either aircraft.

On that basis I see no reason why we cannot very quickly discuss with you the suggestion you are making.

I must say at the same time that I am only reacting as you make the suggestion, that to ask of the Tool Company to bond a performance by Convair, offhand, just strikes me as perhaps a somewhat unusual request.

I would recognize your concern about delays. I don't know—I don't know anything about past experiences or the fact with respect to the past as to responsibility for delays.

Mr. Tillinghast: You know that we have had very poor experience with Convair on deliveries.

Mr. Davis: With Convair as a manufacturer, you mean?

Mr. Tillinghast: Yes.

Mr. Davis: No, I am not familiar with those facts at all. Perhaps it would be fair, quite apart from what the Hughes Tool Company is willing to do, perhaps we ought [fol. 19916] to see what Convair is willing to do, and bring them into the picture.

Mr. Tillinghast: The only thing I wanted to say, and I have got to leave, is this:

If we are to give any serious consideration to this whole thing, we have to have a very specific proposition, and you realize that time is running.

Mr. Davis: I understand that, and I can only assure you, I can give you my personal assurance that there is good faith in trying to solve this.

Mr. Tillinghast: With no offense to you, Mr. Davis, your personal assurances are of no value to us. You have no airplanes, you can't sell any airplanes. What we need is a definite, specific proposition.

Mr. Davis: I appreciate that.

Mr. Tillinghast: I apologize for having to run, but I did want to leave that thought with you before I left.

Mr. Davis: Yes, sir. Thank you for coming.

Well, let me, then, in accordance with your suggestion, Mr. Rowe, list briefly what I have been furnished as items [fol. 19917] which ought to be considered as relating to performance factors which are important to an operator such as TWA.

Maybe I will repeat some of them.

One, the 990 can be refueled at a rate of 300 gallons per minute versus—

Mr. Reed: 240.

Mr. Davis: No. I have 65-234 gallons per minute. Is that the way it should be stated?

Mr. Rummel: I don't know. I'd have to look that up. I think your previous quotation was on the order of 240.

Mr. Davis: Looking at the material furnished to me, which I have at this time, it reads "300 gallons per minute versus 65-234 gallons per minute for the 707," which we feel is a real advantage in reducing ground time.

Two, the 990 has a more advanced individual wheel and tie-skid system versus the paired wheel system for the 707.

This, we believe, results in greater braking reliability as well as shorter landing distances.

Three, the 990 high landing weight proportion to ramp [fol. 19918] weight permits greater capability of operating short stage-lengths without intermediate refueling, thus also reducing ground-time.

I have already itemized, I believe, items which I classify as important passenger comfort features, which should reflect themselves in substantially greater revenues to the airline.

Some of the design features which we believe can be characterized as reducing maintenance costs and the reliability of the aircraft in addition to the very important Scotch-weld fuel tank, which I previously mentioned, are the following items:

The 990 has as much as 40 per cent lower wing and fuselage stress levels, resulting in longer fatigue-free life of the structure; that the 990, as well as the 880, as I understand it, are the only jet transports using 24-ST.

What does that mean?

[fol. 19919] Mr. Rummel: That is a type of aluminum alloy material.

Mr. Davis: And 14-ST?

Mr. Rummel: That is another type.

Mr. Davis: Aluminum alloy resulting in longer fatigue-free maintenance life. The 990 employs heavier fuselage skins and heavier and more rugged wing-trailing edge structure, which we believe also contributes to low maintenance cost and fatigue-resistant structures.

The 990, we understand, is the only jet transport using no magnesium sheet inside or outside the structure, again resulting in reduced maintenance costs.

We believe that the 990 has the most rugged landing gear of any jet aircraft in production today.

We understand that the 990 engine pods are designed to withstand approximately 50 per cent greater side load than the 707, in order to withstand more violent maneuvers. In that connection, it is our understanding, but something which I believe should be further checked out, that the Boeing series has had some difficulty with their engine pods [fol. 19920] and that they have had some experience of losing some of them. I am not in a position to make a flat statement in this regard, but this is a matter which I would have —that I would normally, if the time was available, have checked out further.

Perhaps this is a matter that is already well known to you gentlemen. I don't know. The 990, as we understand it, employs heavier cargo floor paneling, resulting in lower maintenance costs.

I understand that the 990, and now we are getting into an area which would not necessarily form the basis for a difference in judgment as to whether one aircraft or the other should be taken, but I will mention them, following Mr. Rowe's suggestion as to items which of the moment are the basis of our believing that there are advantages, from a technical point of view, to the 990 aircraft over the Boeing.

One of these items relates to the wind-shield rain-clearing system that they have, and the increased visibility from the cockpit.

I believe that favors the 990 over the 707. I also understand that the 990 fuel system is unique in its concept and has definite advantages.

[fol. 19921] There again, I am at a loss at the moment to fully express the advantage of the 990 over the 707 in that area.

Now, one very important matter is the fact that the 990, we believe, costs substantially less than the Boeing. I am particularly addressing myself now to the 990s available to TWA at the cost basis that the Hughes Tool Company obtained at the time of its commitment.

I have already described the delivery schedule which we understand Convair is capable of meeting, and which we consider to be a substantial advantage over the Boeing.

Now, it is my understanding that, quite apart from the jet aircraft that was committed for by the Tool Company, and which is available to TWA, is that Convair is in a position to, and did submit a proposal, as I understand it, to TWA for some twenty 990s with a delivery schedule which is a substantial improvement over the delivery schedule which, I understand, you would be able to get from Boeing.

It is also my understanding, however, that there never has been any discussion between TWA and Convair as to [fol. 19922] the terms of the financing for the acquisition of those jet aircraft, and that their proposal, apart from quoting a price, did indicate that they were prepared to discuss the financing of that aircraft.

I don't know to what extent any inclination toward the Boeing is based upon any financing arrangements which the Boeing company may have made, because I am totally unfamiliar, and my understanding is that there is no one connected with the Hughes Tool Company who is familiar with the details of that, although I may be wrong in that regard, but that is my understanding at this moment.

It is also our understanding that you have been formally informed by Convair that it had resolved this oscillating problem as a result of some tests that were completed, as I understand it, either at the end of April or early May.

Now, there is another area which I was planning to present, although I realize it's really an area which would more properly be presented to a different group representing TWA, and that relates to the financing which is con- [fol. 19923] templated in connection with the Boeing arrangement, and I would like to suggest that perhaps this should be a subject for discussion with perhaps a group of management at a somewhat different level than the group now present.

Mr. Leslie: A lower level?

Mr. Davis: Conceivably. It depends on how you grade your level. Different, I meant, merely, sir, that in the sense that it involves policy considerations which I would describe as relating to concepts arising from the 1960 financing in this voting trust arrangement, rather than problems relating to what otherwise might be considered as financing problems or cash flow questions of the airlines.

The fact of the matter is that if we were to assume that a great many of the points made by me on behalf of the Tool Company today were matters that in one form or another had been considered and still resulted in a business judgment leaning towards the Boeing purchase, it does seem to me that in view of the fact that the present management for reasons that are not its fault, and I'm not addressing myself to the faults of any individuals, is in somewhat a peculiar [fol. 19924] position as a result of this voting trust arrangement that has been made.

If you look at it from the point of view of this airline reverting to the control of the owners at some time in the future, be it near-term or long-term, but within the life usefulness of this equipment we are talking about, and assuming that all other things are relatively the same, it seems to me that you ought to consider whether or not, or what is, or what are the reasons which are so prevailing, so compelling as to require—perhaps I should not use the word "saddling," but it is the one that occurs to me—returning this airline to its owners whenever the function of this voting trust has ended, with equipment of the magnitude we are talking about, with the huge costs involved, when it represents equipment which is not what the owners want.

Mr. Reed: Chester, I think, as you suggested, this is in an area that is divorced from this. I think probably I will make the suggestion that before any summit conference be held, the lower echelons, meaning the lawyers, should properly discuss that, and arrive at an agenda.

[fol. 19925] Mr. Davis: I am inclined to agree with that. Let me say that this is the best I can do at the moment within the time available to me—and I am referring from Wednesday morning of this week until now—in gathering as rapidly and as efficiently as I could information relating to this problem, and I hope that not only myself, but some persons better qualified than I am, will have an opportunity of presenting, with perhaps—well, with undoubtedly more factual data, supporting the statements that I have made.

I do want you gentlemen to understand that I am prepared to present to you, if you care to have it, supporting facts and data to support some of the rather broad and general statements that I have made today.

Mr. Rowe: You are always free to present anything that you think—

Mr. Davis: I understand that, Mr. Rowe. The only thing I find very disturbing is whether I am being asked to present facts and details in connection with a situation which has reached the point where it is beyond control to change, [fol. 19926] and that was really the reason for my earlier inquiry. If that is the assumption I must make, then I think we have a different kind of problem which would require a different approach on my part, and particularly in view of the situation I find myself in personally with the staff currently available to me, I must devote my time and energies in a fruitful line of effort, and that is what I find particularly troubling at this time, because if I am to assume, although I gather from what Mr. Tillinghast said before he left that perhaps the situation is not as black as may appear on the surface, and if that is so, then, of course, I want to devote all the time and energy available to us to doing one thing: giving you information.

If, on the other hand, I am to assume that decisions have been made which are irrevocable for one reason or another, then I still want to devise some solution to them in some way or other, but the thrust of my efforts would be in an entirely different area, and I don't have the personnel to enable me to divide myself or my efforts.

Mr. Rowe: Naturally, the use of any information depends on the nature of the information.

[fol. 19927] Mr. Davis: It isn't the question of use. The question is whether we are discussing it with people in a position to make a decision, or whether I am discussing it with someone who says, "Well, it's very interesting, but a decision has already been made."

That creates in my mind an entirely different area of discussion and problems to be solved.

When I make these remarks, I am not suggesting that we want to try to do anything other than find an amicable solution, no matter what the status of things are.

My interest in determining what the status of things are is primarily for the purpose of devoting what time or energy is left to something that may produce something to the best advantage of all concerned.

After all, I do represent someone who has an extremely large investment in this company, and as long as he has that extremely large investment, we intend to protect it, at whatever cost.

At the same time, we are not trying to take approaches, or take positions, particularly publicly, that are going to [fol. 19928] adversely affect that investment.

Now, I can't be any blunter than that. Thank you for your patience. I will be glad to take any request for further information.

If I can undertake to get it for you, I'll do so as fast as possible. You may communicate with me at any time, and if there is anything in an area that you would like me to obtain because you think it might be helpful, I'll more than welcome and entertain any such suggestion.

Mr. Rowe: Bob, do you have any questions?

Mr. Rummel: No, I don't at the moment.

Mr. Rowe: Lloyd?

Mr. Hall: No, I am perfectly clear on what he outlined here.

Mr. Davis: May we leave it that on Monday we can arrange a meeting to discuss the areas we did not discuss today?

Mr. Reed: No, I'll contact you to see if we can arrange it.

* * * * * * *

[fol. 19932]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 39

May 29, 1961

Mr. Raymond M. Holliday
Hughes Tool Company
Gulf Building, 22nd Floor
Houston 2, Texas

Dear Mr. Holliday:

The letter of May 26, 1961, from Mr. Chester C. Davis to the Board of Directors of TWA and others, states that it is the desire of Hughes Tool Company to confer with the addressees of that letter "as soon as possible with the objective of working out an amiable solution wherever there may be a difference of opinion". I am, and always have been, ready and willing to discuss with representatives of Hughes Tool Company any and all matters of interest to TWA and its stockholders. You will recall that in my letter of May 3, 1961, I suggested that we sit down and discuss matters of mutual interest, but that you did not respond to my letter.

Mr. Davis' letter of May 26, 1961, states that Hughes Tool Company objects to TWA's acquisition of 26 additional Boeing aircraft when TWA could acquire Convair aircraft on order by Hughes Tool Company. The letter states that Hughes Tool Company does not believe these Boeing aircraft are best suited to the needs of TWA.

TWA's commitment to acquire the Boeing aircraft was made only after the most careful consideration of TWA's requirements for additional jet aircraft and only after the officers of the company concerned with this matter had unanimously recommended to the Board of Directors that the acquisition of these additional Boeing aircraft would best serve the company's needs for long-range jet aircraft.

If you have any information bearing on the relative advantages to TWA of our purchasing Convair aircraft in place of the Boeing aircraft that is not available to us, I request that you furnish it to us promptly.

Very truly yours,

/s/ Charles C. Tillinghast, Jr.
Charles C. Tillinghast, Jr.

cc: Mr. Chester C. Davis

[fol. 20080]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 58

June 16, 1961

Mr. Raymond M. Holliday
Hughes Tool Company
Gulf Building
Houston 2, Texas

Dear Mr. Holliday:

This will acknowledge receipt of your letter of June 10, 1961, outlining several proposals. I also have your supplementary letter of June 13, 1961.

As I am sure you appreciate, these proposals are of such a nature as to require consideration by the full Board of Directors of TWA and, in view of this, it will not be possible for me to give you any definitive answers prior to the next scheduled meeting of the Board on June 21, 1961. In the interests of time, however, I would like to make a number of preliminary comments relative to various issues which appear to be presented by your proposals.

Your proposal relative to increasing the Common Stock of TWA is a new one and will have our careful consideration. TWA has suffered greatly from its under-capitalization of the past and we would wish to take every reasonable step to achieve an improvement in our debt-equity ratio.

It clearly will not be possible to dispose of the equity financing proposal within the ten day period suggested in your letter. As you undoubtedly realize, any refinancing under the conditions suggested would require not only the agreement of Hughes Tool Company, TWA and the holders of TWA's senior debt but, in addition, would require approval by the Civil Aeronautics Board. From the standpoint of TWA, it is difficult to see why an arrangement of this type would not be just as valid several months from today as now. Possibly, I misunderstand some of the factors involved but, at the moment, it would appear that the [fol. 20081] proposal should be dealt with deliberately and carefully and not under any unnecessary pressure of time.

I have proceeded and will proceed, within the bounds that time permits, to assemble such information as I believe necessary for an intelligent consideration by the Board of Directors and others of the equity financing proposal. You can be of assistance in furnishing further details with respect to your proposals as from time to time elaboration may seem desirable. At this time I believe further information is required in two areas of your first proposal. They are:

(a) You should advise us as to what securities Hughes Tool Company proposes to place in escrow and, in particular, whether such securities would include the recently issued subordinated debentures of TWA. Obviously, the nature of the securities in question are factors which need to be considered.

(b) Your proposal is conditioned upon termination of the existing Voting Trust. It is my understanding that the lending institutions insisted upon a Voting Trust, in addition to the "management clause", as a necessary condition to making loans to TWA at the end of 1960 and that this decision was reached only after the matter had been considered at great length. We cannot, with any realistic hope of success, ask the lending institutions to reverse an important policy decision made less than six months ago, unless you can supply us with facts not now in our possession. These facts should consist of an expression from you of the reasons which prompt Hughes Tool Company to seek at this time the termination of the Voting Trust and of the changes, internal to Hughes Tool Company or otherwise, which have occurred and will continue which would make desirable now that which was undesirable to them in December, 1960. The mere statement that Hughes Tool does not now intend to change the management is, of course, not sufficient, for otherwise you would not at this time request the termination of the Voting Trust.

Facts with respect to these changes, internal to Hughes Tool Company or otherwise, have particular significance in connection with future financing. Since the establishment of [fol. 20082] the Voting Trust was an essential condition to our obtaining our existing loans of $165,000,000, they have been stated to us as obvious requirements of any future financing, unless the causes for the establishment of the Voting Trust have been removed. Present indications are that substantial financing will be needed in the next few years additional to the equity proposed to be added.

You are mindful, I know, that stability of management is an important element in the receipt of credit, and that this is particularly so in the instance of a company whose past history has been marked by a high degree of instability. It is also particularly true of a carrier whose only available security is a chattel having a relatively high depreciation rate and being subject to abnormal risks of obsolescence.

Further in this connection, we cannot ignore the fact that the vesting of control of TWA in Hughes Tool Company will require the approval of the Civil Aeronautics Board. In light of the clear statements of the CAB in connection with such control, it would be foolish as practical businessmen to spend time and effort in seeking to carry out your proposal without some facts that would lead us to believe that there was a reasonable chance of success in this forum. You should furnish us with the information you would propose to present to the CAB in support of your application to reassume control.

Turning to proposal number two, Mr. Rowe explained to Mr. Davis the obvious impracticability of obtaining on a day's notice an answer to this proposal. You have expressed a willingness to extend the period of time. The mechanics of achieving the desired result, should the parties reach agreement, would not seem to present any serious problems. Consequently, I shall discuss the merits of the proposal.

It would hardly seem that an offer to loan TWA an additional $11,235,900 would be sufficient at this late date to induce TWA to purchase the Convair 990s in question. We have reviewed the points raised by Mr. Davis' technical presentation and have not yet perceived any circumstances which should lead us to alter our views as to the superiority of the Boeings for our purposes. The question will again be reviewed by the directors, but I cannot be optimistic that the proferred inducement will be sufficient to cause a change in position.

[fol. 20083] Addressing myself to proposal number three, we are happy at least to have a more definite proposal than has heretofore been presented to us. It should be noted, however, that you have not even yet advised us of the purchase price of the planes, an obviously essential term. You have also failed to advise us of the form in which Hughes Tool Company would want payment for the assignment of its rights under the Purchase Agreement—whether in cash or subordinated obligations or otherwise. These are all facts that, in addition to the relative advantages to TWA of the Convair 990s and other equipment, must be taken into consideration in weighing your proposal.

I note the claim on page one of your second letter that TWA is obligated to acquire the thirteen 990 aircraft "in accordance with past practices". Now that Hughes Tool Company has come to the point of making a flat assertion in this regard, I take the occasion unequivocally to deny it and to remind you that over a period of years both Hughes Tool Company and a TWA that was under its complete control consistently maintained to their creditors and stockholders and to government regulatory agencies that even as to aircraft subsequently acquired by TWA no such obligation existed. I also remind you that at none of the directors meetings in recent months at which the proposed Boeing purchase was discussed did you make any such claim or assertion.

I should also like to note that the assumption on page two of your second letter that we are fully familiar with the Hughes Convair purchase agreement is entirely in error.

You may consider this our final answer that we have no interest in the Convair 880Ms to which you referred. These would be four odd planes in our fleet and would, therefore, present serious operational problems. As to the regular 880s of our design, I would repeat (without any commitment whatsoever) the request already made several times by Mr. Leslie that you present us with a definite proposal, including [fol. 20084] price. I would also welcome your advice as to whether you would be prepared to rent these planes. If so, the terms should be clearly stated.

Please let us have answers to our various questions at an early date. The matters relating to the purchase of airplanes should have been raised and discussed months ago and the time within which further discussions could lead to any practical results is rapidly disappearing.

Very truly yours,

TRANS WORLD AIRLINES, INC.

/s/ CHARLES C. TILLINGHAST, JR.,
President

cc: C. S. Rowe, Esq.

bc: Messrs. E. R. Breech
Irving S. Olds
F. C. Reed

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 61

May 31, 1961

BY HAND—11:50 A. M.

New York Stock Exchange
11 Wall Street
New York, N. Y.

Attention of Mr. Philip West

Dear Sirs:

With reference to the offering currently being made by Trans World Airlines, Inc. to its stockholders of rights to subscribe to its 6½% Subordinated Income Debentures and Warrants to Purhase its Common Stock, this is to advise you that Hughes Tool Company intends to sell rights received by it up to an amount which will be dependent on market conditions but which in no circumstances will exceed 85% of our such rights.

This is further to advise you that with respect to the said Debentures and Warrants of TWA which may be acquired by Hughes Tool Company pursuant to said offering, Hughes Tool Company will not make a secondary offering at this time. Hughes Tool Company does, however, intend to consider the desirability of an offering or offerings of some or all thereof in the future subject to then market conditions and the advice received from its financial advisers.

You are authorized to release publicity to the above effect.

Very truly yours,

HUGHES TOOL COMPANY

By

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 62-A

AS DICTATED MAY 31, 1961

6:00 p.m. AIS:JET

To: Daily Mirror
Daily News
N. Y. Herald Tribune
N. Y. Journal American
N. Y. Post
N. Y. Times
N. Y. World-Telegram
Associated Press
United Press International

PRESS RELEASE FROM CHESTER C. DAVIS, COUNSEL FOR HUGHES TOOL COMPANY

The following is an excerpt of a letter to the New York Stock Exchange from the Hughes Tool Company:

> "With reference to the offering currently being made by Trans World Airlines, Inc. to its stockholders of rights to subscribe to its 6½% Subordinated Income Debentures and Warrants to Purchase its Common Stock, this is to advise you that Hughes Tool Company intends to sell rights received by it up to an amount which under no circumstances will exceed 85% of such rights.
>
> This is further to advise you that with respect to the said Debentures and Warrants of TWA which may be purchased by Hughes Tool Company pursuant to said offering, Hughes Tool Company does not intend to make a secondary offering at this time. Hughes Tool Company does, however, intend to make such an offering or offerings in the near future subject to market

conditions and the advice received from its financial advisers."

The New York Stock Exchange has advised that the subscription rights issued to stockholders of TWA other than Hughes Tool Company will be admitted for trading on the New York Stock Exchange on Thursday, June 1, 1961.

[fol. 20090] CHRONOLOGICAL

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 62-B

AS DICTATED MAY 31, 1961

6:00 p.m. AIS:JET

To: Wall Street Journal

PRESS RELEASE FROM CHESTER C. DAVIS, COUNSEL FOR HUGHES TOOL COMPANY

"With reference to the offering currently being made by Trans World Airlines, Inc. to its stockholders of rights to subscribe to its 6½% Subordinated Income Debentures and Warrants to Purchase its Common Stock, this is to advise you that Hughes Tool Company intends to sell rights received by it up to an amount which under no circumstances will exceed 85% of such rights.

This is further to advise you that with respect to the said Debentures and Warrants of TWA which may be purchased by Hughes Tool Company pursuant to said offering, Hughes Tool Company does not intend to make a secondary offering at this time. Hughes Tool Company does, however, intend to make such an offering or offerings in the near future subject to market conditions and the advice received from its financial advisers."

[fol. 20181]

[Letterhead of Chadbourne, Parke, Whiteside & Wolff, New York 4, N. Y.]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 81

June 8, 1961

Mr. Chester C. Davis
120 Broadway
New York 5, N. Y.

Dear Mr. Davis:

Your letter of June 4, 1961 stated that the information that you furnished to TWA last Friday afternoon was only the material "which could be assembled in a very short period of time following Mr. Tillinghast's letter of May 29." The request made by Mr. Tillinghast in his letter of May 29 was that Hughes Tool Company furnish to TWA any information it had, bearing on the relative advantages to TWA of Convair over Boeing aircraft, that was not available to TWA. As you know, this request resulted from the statements in your letter of May 19, 1961 to TWA and the Securities and Exchange Commission and your letter of May 26, 1961 to the Board of Directors of TWA and others that Hughes Tool Company believed the Convair equipment was more suitable to the needs of TWA, and more competitive than the Boeing equipment. The meeting on Friday was, in addition, held at your request because of your statement in a telephone conversation with me on May 31, 1961 that Hughes Tool Company had information on the relative merits of the Convair 990s and the Boeing aircraft that should be considered by the directors of TWA.

Your letter indicates that you are considerably disturbed at a suggestion of a penalty bond to secure scheduled delivery of the Convair 990s. The fact that this is disturbing to you is of concern to TWA. I am sure Hughes Tool Company is aware of the fact that there have been substantial delays in the deliveries of the Convair 880s to TWA. An important fact to TWA in any consideration of the Convair 990s would be what assurances TWA would have that the Convair 990s would be delivered to TWA according to schedule. I feel TWA would not be inclined to make com- [fol. 20182] mitments for the purchase of Convair 990s unless it had definite protection from someone against delays in delivery.

Your letter also states that Mr. Tillinghast said that consideration could still be given to Convair equipment, provided that certain conditions are promptly met. I believe you have misinterpreted Mr. Tillinghast's statement. What he clearly said was that if TWA is to consider the acquisition of Convair 990s it has to have a "specific, definite written statement of the terms on which they would be available, including the question of whether or not Hughes Tool Company would be willing, in effect, to give us a delivery bond and pay us a penalty for every week of delay from the deliveries which you state." In other words, Mr. Tillinghast was saying that if Hughes Tool Company wished to make a proposal to TWA with respect to the Convair 990s, it should do so in specific terms and it should be the best proposal, from TWA's standpoint, that Hughes Tool Company is in a position to make. If Hughes Tool Company has any proposal it wishes to make with respect to the financing of Convair aircraft, it would seem desirable that this be made at the same time.

Particularly in view of the recent statements and attitudes of Hughes Tool Company, I believe it would be inappropriate for me to furnish you at this time with all "the detailed terms of the financing currently being negotiated by TWA with certain lending institutions", as you requested. However, if you have any specific questions relating to this matter, I will take them up with the Company so that consideration can be given as to whether furnishing this information would be reasonable under the circumstances.

Very truly yours,

/s/ Carl S. Rowe

[fol. 20509]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 117

10:30 or after lunch

7-19-61

7-19-61

Bob talked to Sessel.

TWA Board—Summer Losses bad—21MM for 7 mos.

Break even for year—6MM cash end of yr vs. 10 MM

W Cap limit by end of year—Till. & Leslie will talk to Banks next Tuesday—

(1) This presumes that Tool Co may have to come up with some money on its guaranty.

(2) May not tell other Bks—Now HRH scared by Cahill law suit—but worse than expected—They have concluded if get him on stand—would keep him there for 2 or 3 mos.

Greg asked Reed to come out & talk settlement. Reed was here 3 days—went back with a memo & Tool Co authorized Greg to w/o a settlement—Holliday told Greg that HRH had told H that Tool Co will put 150MM into TWA with '62 & '63 financing about ½ in 4½% subord debentures—balance in common at price to be determined (Would get part from offering of 100MM debentures now owned—remainder to be put in—in the future & Collateralized to Vote Trustees. A suggestion that 990's be taken by T.W.A. (Conceivably TWA might use at a lower than HRH cost.

Law suit sealed until Aug. 1, 1961

[fol. 20592]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 132

THREE-PARTY AGREEMENT

AGREEMENT, dated January 31, 1947, between HUGHES TOOL COMPANY (hereinafter called "Hughes"), a Delaware corporation, party of the first part, TRANSCONTINENTAL & WESTREN AIR, INC. (hereinafter called the "Corporation"), a Delaware corporation, party of the second part, and THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (hereinafter called "Equitable"), a New York corporation, party of the third part;

WHEREAS, Hughes is the owner of 454,850 shares of common stock of the Corporation; and

WHEREAS, 12,750 of said 454,850 shares of common stock are subject to options originally granted to Jack Frye and so long as said 12,750 shares remain subject to any of said options or any extensions thereof shall not for any purpose of this Agreement be deemed to be owned by Hughes but upon the expiration of said options and any extensions thereof all said 12,750 shares (or those remaining unpurchased under said options) shall for all purposes of this Agreement be deemed to have been acquired by Hughes at the time of such expiration; and

WHEREAS, Equitable is the owner of $40,000,000 principal amount of the Corporation's Debentures (hereinafter called the "Debentures") consisting of $30,000,000 principal amount of 3% Sinking Fund Debentures (Series A) and $10,000,000 principal amount of 2¼% Sinking Fund Debentures (Series B) all issued and outstanding under the Corporation's Indenture dated as of December 1, 1945, entered into with The Commercial National Bank and Trust Company of New York, as Trustee, as amended by the Supplemental Indenture dated as of June 1, 1946 (said Indenture as so amended being hereinafter called the "Indenture"); and

Whereas, the Corporation deems it desirable, to provide additional working capital and for other corporate purposes, to increase its indebtedness for money borrowed by an aggregate amount of $10,000,000 and to evidence the [fol. 20593] same by its Subordinated Convertible 2¾% Notes hereinbelow more particularly described, and to that end desires to borrow $5,000,000 concurrently with the execution and delivery hereof and sums aggregating an additional $5,000,000 on or prior to May 29, 1947; and

Whereas, Hughes is willing to lend $5,000,000 to the Corporation forthwith and to lend sums aggregating an additional $5,000,000 to the Corporation on or prior to May 29, 1947, all on the terms and conditions hereinafter set forth; and

Whereas, the Corporation and Hughes desire to have Equitable, as the holder of all the Debentures, waive, to the extent hereinbelow set forth, the restrictions of the Indenture which would prohibit the borrowing of said $5,000,000 forthwith, and consent, subject to the consummation of the borrowing of said additional sums aggregating $5,000,000, to the amendment of the terms and provisions of the Indenture and the Debentures in the manner set forth in the form of the Second Supplemental Indenture annexed hereto as Exhibit A and to the execution and delivery of said Second Supplemental Indenture by the Corporation and said Trustee.

Now, therefore, in consideration of the premises, the parties hereto agree with each other as hereinbelow set forth:

1. Simultaneously with the execution hereof, Hughes will lend $5,000,000 to the Corporation and the Corporation will execute and deliver to Hughes to evidence such indebtedness its Subordinated Convertible 2¾% Note dated January 31, 1947, in the principal amount of $5,000,000 and in the form attached hereto as Exhibit B.

2. Hughes hereby agrees to lend to the Corporation and the Corporation hereby agrees to borrow from Hughes,

sums aggregating $5,000,000, on or from time to time prior to May 29, 1947, each such borrowing to be evidenced by a Subordinated Convertible 2¾% Note dated as of the date of such borrowing and otherwise in the form of the Subordinated Convertible 2¾% Note attached hereto as Exhibit B.

[fol. 20594] 3. Equitable hereby waives the covenants contained in Section 4.14 of Article IV of the Indenture to the extent necessary to permit the Corporation to incur and to remain liable for the indebtedness referred to in paragraphs 1 and 2 hereof until the earlier of May 29, 1947 or the date on which sums aggregating $5,000,000 have been borrowed pursuant to paragraph 2 hereof.

4. Subject to the consummation of the borrowing of sums aggregating $5,000,000 referred to in paragraph 2 hereof (as to which fact the Trustee under the Indenture may conclusively rely upon a Certificate of the Company, as that term is defined in the Indenture), Equitable, on behalf of itself and subsequent holders of the Debentures, hereby consents to and approves the execution and delivery by the Corporation and the Trustee under the Indenture of the Second Supplemental Indenture, in the form of Exhibit A hereto, and hereby consents and agrees that any notice of redemption on June 1, 1947 of Debentures for the sinking fund provided for in the Indenture which shall have been given prior to the execution and delivery of said Second Supplemental Indenture shall, forthwith from and after the execution and delivery on or prior to May 29, 1947, of Second Supplemental Indenture, be deemed to be null and void and of no force or effect. Equitable agrees that concurrently with the execution and delivery hereof Equitable will cause to be inscribed upon all the Debentures substantially the following words:

> "Subject to Three-Party Agreement dated January 31, 1947, copy of which is on file at office of Trustee."

Such words shall likewise be inscribed by the Trustee on any Debentures authenticated and delivered hereafter and prior to the earlier of (a) the date when said Second Supplemental Indenture has been executed and delivered or (b) the date, after May 29, 1947, when the Equitable shall deliver to the Trustee a statement in writing to the effect that the borrowing of sums aggregating $5,000,000 referred to in paragraph 2 hereof has not been consummated. After the earlier of said dates any such inscription shall be of no further effect. Equitable further agrees that it will present to said Trustee, promptly after its request made on or [fol. 20595] after the date of the consummation of the said borrowing, said Debentures for the endorsement thereon of the notation referred to in Article Two of said Second Supplemental Indenture.

5. In the event that either (a) the borrowing of sums aggregating $5,000,000 provided for in paragraph 2 hereof shall not be consummated on or prior to May 29, 1947, or (b) whether or not such borrowing shall be consummated, the Corporation shall at any time be in default in the payment of the principal of or interest on any of the Debentures, when and as the same shall become due and payable whether at maturity, by declaration, by call for redemption or otherwise, then, and in either such case, Hughes hereby agrees that it will within ten days after the service on it of a request therefor by Equitable, cause to be subjected to a Voting Trust Agreement, to be dated as of the date of such request, in the form attached hereto as Exhibit C (hereinafter called the "Voting Trust Agreement"), all shares of common stock of the Corporation owned by Hughes at the date hereof or acquired by Hughes prior to the execution and delivery of the Voting Trust Agreement (except any such shares theretofore transferred by Hughes by a sale in connection with which a registration statement became effective under the Securities Act of 1933, as amended) and the Corporation and Hughes hereby agree that they will take all action requisite on their part to cause the Voting Trust Agreement to be executed and delivered by the Corporation and Hughes respectively and by the Voting Trustee to be nominated by Hughes as hereinafter provided. The Voting Trustees under the Voting Trust Agreement shall consist of three persons, two to be nominated by the Equitable and one to be nominated by Hughes, provided, that in the event that Hughes shall fail

within said ten-day period to designate such a nominee, or, in the event of the failure of such nominee to execute the Voting Trust Agreement, the third Voting Trustee shall be a person designated by the two Voting Trustees nominated by Equitable. Any such request by Equitable shall be in writing and shall specify the names of the two Voting Trustees nominated by Equitable, and shall be deemed sufficiently served if mailed by registered mail, postage prepaid, addressed to Hughes at 2223 Gulf Building, Houston, Texas, or at such other address as may be furnished [fol. 20596] in writing by Hughes to Equitable. Concurrently with the service of said request upon Hughes, a copy thereof shall be served in the same manner upon the Corporation at its Home Office in Kansas City, Missouri, or at such other address as may be designated to Equitable in writing by the Corporation for such purpose. In order to subject said common stock to the Voting Trust Agreement, Hughes will transfer and assign or cause to be transferred and assigned said common stock to the said Voting Trustees and will deposit or cause to be deposited with the Agent of the Voting Trustees named in the Voting Trust Agreement the certificates for such shares, all of which certificates, if not registered in the name of the Voting Trustees, shall be duly endorsed in blank or accompanied by proper instruments of assignment and transfer thereof duly executed in blank with signatures guaranteed and in either case properly stamped for transfer. Hughes further agrees that if, at any time or from time to time after the execution and delivery of the Voting Trust Agreement it shall acquire additional shares of common stock of the Corporation in any manner, whether through the exercise of the conversion rights contained in the Subordinated Convertible 2¾% Notes or otherwise, it will forthwith upon the acquisition of any such additional shares cause the same to be subjected to the Voting Trust Agreement in the same manner as hereinabove set forth with respect to the shares of said stock owned by Hughes at the time of the execution and delivery of the Voting Trust Agreement. It is further agreed that any shares of common stock of the Corporation which shall at any time be issued upon conversion of any of the Subordinated Convertible 2¾% Notes to any subsequent transferee or holder thereof shall, for all purposes of this paragraph 5 and of paragraph 6 hereof, be deemed to constitute shares of such stock acquired by Hughes subsequent to the date hereof and transferred by Hughes.

6. Hughes agrees that as regards such shares of said common stock as are presently pledged, it will, concurrently with the execution hereof, obtain the consent of the pledgee to the performance by Hughes of its agreements set out in paragraph 5 hereof and Hughes further agrees that in the event it shall, subsequently to the date hereof, pledge or otherwise transfer (by sale or in any manner, other than [fol. 20597] by a sale in connection with which a registration statement shall have become effective under the Securities Act of 1933, as amended) any shares of said common stock at any time owned by it, such pledge or transfer shall be made expressly subject to the requirement that such pledgee or transferee will effectively provide for the subjection of such common stock to the Voting Trust Agreement in the same manner as Hughes would be required to do if Hughes had continued in the possession of the certificates representing said common stock. Hughes further agrees that concurrently with the execution and delivery hereof Hughes will cause to be inscribed upon the certificates for all shares of such stock now owned by it, and forthwith upon the acquisition by Hughes of any additional shares of such stock will cause to be inscribed upon the certificates therefor, immediately following the name of the registered owner, substantially the following words:

> "Subject to Three-Party Agreement dated January 31, 1947, copy of which is on file at office of Transfer Agent."

The Corporation agrees that concurrently with the execution and delivery hereof and from time to time thereafter it will furnish to the Transfer Agent and the Registrar for its common stock such resolutions, instructions and other authorizations as may be requisite to cause said words to be so inscribed on all certificates for shares of said common stock which are subject to the agreements of Hughes contained in paragraph 5 hereof.

7. It is understood that the proxy hereinbelow granted by this paragraph 7 and the provisions of this paragraph 7 relating thereto are to be deemed to constitute distinct and separable provisions from the other provisions of this Agreement and that said proxy is being granted by Hughes because Hughes believes that, in the event of the happening of one of the conditions hereinbelow specified upon which the effectiveness of said proxy depends, it will be for the best interests of the Corporation and its stockholders to vest in Equitable the power to vote and act with respect to all of the shares of common stock of the Corporation with respect to which Hughes shall be entitled to vote and act, so long as Equitable is willing to exercise such [fol. 20598] power, pending the subjection of such shares to the Voting Trust Agreement in accordance with the provisions of paragraph 5 hereof.

If either (a) the borrowing of sums aggregating $5,000,000 provided for in paragraph 2 hereof shall not be consummated on or prior to May 29, 1947, or (b) whether or not such borrowing shall be consummated, the Corporation shall at any time be in default in the payment of the principal of or interest on any of the Debentures when and as the same shall become due and payable, whether at maturity, by declaration, by call for redemption or otherwise, then and in either such event Hughes hereby constitutes and appoints Equitable its true and lawful attorney, agent and proxy, with full power of substitution, for and in its name, place and stead to vote and act, with respect to all of the shares of common stock of the Corporation with respect to which it shall be entitled to vote and act, at any meeting of stockholders of the Corporation, whether regular or special, and at any and all adjournments thereof, with all the powers it would possess if then and there personally present, and it hereby revokes any and all proxies heretofore given to any person or persons other than Equitable to vote or act with respect to such shares of common stock of the Corporation and hereby ratifies and confirms all that its said attorney, agent and proxy or any substitute acting therefor may lawfully do by virtue hereof. Hughes covenants that it will not revoke the aforesaid proxy in any manner whatsoever prior to the effective date of the Voting Trust Agreement. The proxy hereby granted shall be deemed to become effective and to be dated as of the earliest date on which any of the conditions specified in clause (a) or (b) above shall occur, and, so long as none of such conditions has occurred, shall not affect or be affected by the grant of other proxies dated after the date of this Agreement, but in the event that any one of said conditions shall occur subsequent to the date of any such other proxy but prior to its exercise, then such other proxy shall be deemed to be revoked by this proxy and to be void and of no effect. The term of the proxy hereby granted shall not be deemed limited to three years from its effective date but shall be deemed to extend until said common stock has been subjected to the Voting Trust Agreement, or, until the date when all of the Debentures shall cease to be outstanding, whichever is the earlier, but in no event beyond June 1, 1956.

[fol. 20599] 8. The Corporation and Equitable hereby agree that the Debenture Purchase Agreement dated May 10, 1946, shall be deemed amended by the deletion therefrom of Section 4 thereof.

9. The Corporation agrees that it will pay the fees and disbursements of Equitable's counsel, Messrs. Milbank, Tweed, Hope, Hadley & McCloy, for their services in connection with the matters preliminary to this Agreement and all matters hereby provided for and that it will pay all other charges or taxes which may be payable as the result of the transactions provision for which is made herein and it will reimburse the Equitable for any out-of-pocket expenses to which it shall have become subject in connection herewith.

10. This Agreement shall not be amended, modified or terminated except with the written consent of each of the parties hereto.

11. All covenants, conditions and provisions of this Agreement are and shall be held to be for the sole and exclusive benefit of Hughes, the Corporation and Equitable

and no other person shall have any legal or equitable right or remedy to enforce the provisions hereof; provided that the Trustee under the Indenture shall be entitled to rely upon all waivers and consents of Equitable contained herein with respect to the Indenture and the Debentures.

12. This Agreement may be executed in several counterparts, each of which when so executed shall be deemed to be an original, and all such counterparts shall together constitute but one and the same Agreement.

[fol. 20600] In Witness Whereof, the parties hereto have duly executed this Agreement as of the day and year first above written.

Hughes Tool Company

[corporate seal] By Noah Dietrich
Vice President

Attest:

Thelma Abbott
Assistant Secretary

Transcontinental & Western Air, Inc.

[corporate seal] By Otis F. Bryan
Vice President

Attest:

Margaret Ewell
Assistant Secretary

The Equitable Life Assurance Society of the United States

[corporate seal] By J. L. Montgomery
Asst. Treasurer

Attest:

Alex. McNeill
Secretary

[fol. 20601]

Exhibit A to Defendants' Exhibit No. 132

TRANSCONTINENTAL & WESTERN AIR, INC.

and

THE COMMERCIAL NATIONAL BANK AND TRUST COMPANY OF NEW YORK,

Trustee

Second Supplemental Indenture

Dated as of January 15, 1947

Supplemental to Indenture Dated as of December 1, 1945

[fol. 20602] SECOND SUPPLEMENTAL INDENTURE dated as of January 15, 1947, between Transcontinental & Western Air, Inc., a corporation of the State of Delaware (hereinafter called the "Company"), party of the first part, and The Commercial National Bank and Trust Company of New York, a national banking association duly organized and existing under the laws of the United States of America (hereinafter called the "Trustee"), party of the second part.

Whereas, the Company has heretofore executed and delivered to the Trustee an indenture (hereinafter called the "Original Indenture") dated as of December 1, 1945 providing for the issue of 3% Sinking Fund Debentures (hereinafter called the "Series A Debentures") of the Company and an indenture supplemental thereto dated as of June 1, 1946 (hereinafter called the "Supplemental Indenture"), providing for the issue of 2¼% Sinking Fund Debentures (hereinafter called the "Series B Debentures") of the Company and certain amendments of the terms of the Original Indenture, said Original Indenture and the Supplemental

Indenture being hereinafter collectively called the "Indenture"; and

Whereas, $30,000,000 principal amount of the Series A Debentures and $10,000,000 principal amount of the Series B Debentures are outstanding at the date of the execution and delivery hereof; and

Whereas, the Company deems it advisable that the Indenture be amended as herein provided and that an indenture supplemental to the Indenture, in the form hereof, be executed and delivered; and

Whereas, the holders of all the Series A and Series B Debentures issued and outstanding under the Indenture have filed with the Trustee their consent, in the manner provided in the Indenture, to the execution and delivery by the Company and the Trustee of this Second Supplemental Indenture, and the Company has filed with the Trustee a Certified Resolution authorizing the execution of this Second Supplemental Indenture; and

Whereas, all acts and proceedings required by law and by the Certificate of Incorporation and By-Laws of the [fol. 20603] Company necessary to constitute this Second Supplemental Indenture a valid and binding agreement for the uses and purposes herein set forth in accordance with its terms, have been done and taken; and the execution and delivery of this Second Supplemental Indenture have been in all respects duly authorized;

Now, Therefore, This Second Supplemental Indenture Witnesseth, that in order to modify and change certain of the provisions of the Indenture, and for and in consideration of the premises and of the mutual covenants herein contained and of the sum of $1 duly paid to the Company by the Trustee at or before the ensealing and delivery hereof, and for other valuable considerations, the receipt whereof is hereby acknowledged, the Company covenants and agrees to and with the Trustee for the equal and proportionate benefit and protection, except as in the Indenture or in this Second Supplemental Indenture otherwise expressly provided, of the holders of the Series A Debentures and of the Series B Debentures and of the bearers of the interest coupons annexed thereto, if any, as follows, to wit:

ARTICLE ONE.

Modification of Certain Provisions of the Indenture.

Section One. Section 1.05 of the Indenture is hereby amended by deleting the first paragraph thereof and by deleting the words "Limited Indebtedness or" from the last paragraph thereof.

Section Two. Section 1.06 of the Indenture is hereby amended by deleting the phrase "or any amount on account of the principal of Limited * * *" and the balance of said Section.

Section Three. Section 1.07 of the Indenture is hereby amended by deleting sub-paragraph (d) and inserting a period in place of "; or" at the end of sub-paragraph (c); and by deleting sub-paragraph (h) and inserting a period in place of "; or" at the end of sub-paragraph (g); by deleting the phrase ", other than Limited Indebtedness," from the last paragraph of said Section 1.07; and by chang- [fol. 20604] ing in sub-paragraph (f) thereof the phrase "*sub-paragraph (a)*" to read "*sub-paragraph (e)*".

Section Four. Sub-paragraph (b) of Section 1.10 of the Indenture is hereby amended by deleting clause (ii) and renumbering the succeeding clauses "(ii)", "(iii)" and "(iv)".

Section Five. Section 1.13 of the Indenture is hereby amended by deleting the third paragraph thereof.

Section Six. Section 4.12 of the Indenture is hereby amended by deleting the last sentence of the first paragraph thereof.

Section Seven. Section 4.14 of the Indenture is hereby amended to read as follows:

> "SECTION 4.14. The Company will not incur, create, assume, guarantee or contingently agree to purchase or in any manner become, be or remain liable in respect of any Funded Indebtedness or Current Indebted-

ness for Money Borrowed, other than *(1)* the Debentures, *(2)* not in excess of $1,239,000 aggregate principal amount of 2% Notes outstanding as of January 15, 1947, issued by the Company to Lockheed Aircraft Corporation, *(3)* indebtedness for Money Borrowed in foreign currencies as an incident to foreign operations, in an amount not to exceed in the aggregate at any one time outstanding the equivalent of $500,000 United States currency (valued as of the date of the creation of the respective indebtedness included in such aggregate), *(4)* indebtedness secured by liens permitted by *sub-paragraphs (d)* and *(g)* of *Section 4.16*, and *(5)* indebtedness for Money Borrowed evidenced by the Subordinated Convertible 2¾% Notes of the Company, in the aggregate principal amount of $10,000,000, originally issued to Hughes Tool Company (hereinafter called the 'Subordinated Notes')."

Section Eight. Sub-paragraph (a) of Section 4.15 of the Indenture is hereby amended by adding at the end thereof "indebtedness to the Company or to a Wholly-Owned Restricted Subsidiary." and by deleting clauses (i) and (ii) thereof.

Section Nine. Section 4.16 of the Indenture is hereby amended by adding the words "(in each case securing the [fol. 20605] payment of money)" after the word "kind" in the fourth line thereof; by deleting sub-paragraphs (e) and (f) therefrom; by deleting the phrase ", (e) or (f)" from the fourth line of sub-paragraph (g) thereof; by adding the word "or" at the end of sub-paragraph (d); and by amending sub-paragraph (c) thereof to read as follows:

> "(c) the Company or any Restricted Subsidiary from acquiring plants for the bulk storage and delivery to aircraft of gasoline in connection with its business, on a deferred payment basis in such manner as may at the time be customary in the air transport industry;".

Section Ten. Sub-paragraph (c) of Section 4.20 of the Indenture is hereby amended by deleting the phrase "plus the Equity Differential, if any," from the second line thereof.

Section Eleven. Sub-paragraph (a) of Section 4.21 of the Indenture is hereby amended by deleting the phrase "or Limited Indebtedness" from the sixth line from the end thereof and sub-paragraph (b) of Section 4.21 of the Indenture is hereby deleted.

Section Twelve. Section 4.23 of the Indenture is hereby amended to read as follows:

> "SECTION 4.23. So long as any of the Debentures issued under this Indenture are outstanding, the Company will not make payment of all or any part of the principal of its Subordinated Notes or pay any interest thereon except to the extent that such interest may become due and payable in accordance with the terms of the Subordinated Notes. The Company will not modify or amend any of the terms of the Subordinated Notes."

Section Thirteen. The Indenture, the Series A and the Series B Debentures and the coupons appurtenant to the Series B Debentures are all hereby amended so that the Series B Debentures shall mature on December 1, 1955 and shall bear interest at the rate of 3% per annum from December 1, 1946 until such Series B Debentures shall become due and payable.

Section Fourteen. Sub-paragraph (c) of Section 5.01 of the Indenture is hereby amended to read as follows:

> [fol. 20606] "*(c)* At the option of the Company, evidenced by a Certified Resolution delivered to the Trustee, the Series B Debentures may, prior to their maturity, be redeemed at any time as a whole, or from time to time in part (but, if in part, only in an aggregate principal amount of $50,000 or a multiple thereof), at:
>
> "One hundred three percent (103%) of the principal amount thereof, if redeemed on or before June 1, 1947;

"One hundred two and three-quarters percent (102¾%) of the principal amount thereof, if redeemed thereafter and on or before June 1, 1948;

"One hundred two and one-half percent (102½%) of the principal amount thereof, if redeemed thereafter and on or before June 1, 1949;

"One hundred two and one-quarter percent (102¼%) of the principal amount thereof, if redeemed thereafter and on or before June 1, 1950;

"One hundred two percent (102%) of the principal amount thereof if redeemed thereafter and on or before June 1, 1951;

"One hundred one and three-quarters percent (101¾%) of the principal amount thereof if redeemed thereafter and on or before June 1, 1952;

"One hundred one and one-half percent (101½%) of the principal amount thereof if redeemed thereafter and on or before June 1, 1953;

"One hundred and one percent (101%) of the principal amount thereof if redeemed thereafter and on or before June 1, 1954;

"One hundred and one-half percent (100½%) of the principal amount thereof if redeemed thereafter and on or before June 1, 1955;

"The principal amount thereof if redeemed thereafter and prior to maturity;

together, in each case, with accrued interest to the date of redemption."

Section Fifteen. Section 6.01 of the Indenture is hereby amended to read as follows:

"Section 6.01. (A). For the purpose of providing a sinking fund for the retirement of Series A Debentures:

[fol. 20607] "(a) The Company covenants that it will, so long as any of the Series A Debentures shall remain outstanding, pay in cash to the Trustee on May 28, 1948, the sum of $500,000 and on May 28, 1949, the sum of $1,000,000 and on May 28th in each year thereafter to and including May 28, 1955, the sum of $2,000,000; and

"(b) The Company covenants that it will, so long as any of the Series A Debentures shall remain outstanding, pay in cash to the Trustee on November 27, 1948 and on November 27th in each year thereafter to and including November 27, 1955, such sum as shall be applicable as an additional sinking fund payment for the retirement of the Series A Debentures pursuant to Section 6.01 (C) hereof.

"(B). For the purpose of providing a sinking fund for the retirement of Series B Debentures:

"(a) The Company covenants that it will, so long as any of the Series B Debentures shall remain outstanding, pay in cash to the Trustee on November 27, 1948, the sum of $500,000 and on each November 27th thereafter to and including November 27, 1953, the sum of $1,000,000 and on November 27, 1954, the sum of $2,000,000; and

"(b) The Company covenants that it will, so long as any of the Series B Debentures shall remain outstanding, pay in cash to the Trustee on November 27, 1948 and on November 27th in each year thereafter to and including November 27, 1954, such sum as shall be applicable as an additional sinking fund payment for the retirement of the Series B Debentures pursuant to Section 6.01 (C) hereof.

"(C). For the purpose of providing for additional sinking fund payments for the retirement of the Series A and Series B Debentures, the Company covenants that it will, so long as any of the Series A or Series B Debentures shall remain outstanding, pay in cash to the Trustee on November 27, 1948 and on November 27th in each year thereafter to and including November 27, 1955, an amount in cash equal (to the nearest multiple of $1000) to the excess of (x) the Net Income of the Company for the period from December 31, 1946 to the end of the fiscal year next preceding said November 27 plus the amount of all interest accrued during said period on the Subordinated Notes over (y) the sum of the amounts paid prior to the end of said fiscal year pursuant to sub-paragraph (a) of Section [fol. 20608] 6.01 (A) and sub-paragraph (a) of Section 6.01 (B) and the amounts previously paid pursuant to this Section 6.01 (C), provided, however, that no payment need be made pursuant to this Section 6.01 (C) on any November 27 if and to the extent that such payment would cause the sum of the amounts theretofore paid and currently to be paid pursuant to this Section 6.01 (C) and pursuant to sub-paragraph (a) of Section 6.01 (A) and pursuant to sub-paragraph (a) of Section 6.01 (B) to exceed an amount equal to the sum of $4,000,000 multiplied by the number of the Company's fiscal years completed subsequent to December 31, 1946, plus $4,000,000 in respect of the then current fiscal year. Amounts payable pursuant to this Section 6.01 (C) shall be applied equally (as nearly as may be, but in multiples of $1,000) in respect of the Series A Debentures pursuant to sub-paragraph (b) of Section 6.01 (A) and the Series B Debentures pursuant to sub-paragraph (b) of Section 6.01 (B), except that whenever such equal application would cause the sum of the amounts theretofore paid and currently to be paid in respect of the Series A Debentures pursuant to sub-paragraphs (a) and (b) of Section 6.01 (A) to exceed an amount equal to the sum of $2,000,000 multiplied by the number of the Company's fiscal years completed subsequent to December 31, 1946, plus $2,000,000 in respect of the then current fiscal year, then such excess shall be applied in respect of the Series B Debentures pursuant to sub-paragraph (b) of Section 6.01 (B). At any time when under the foregoing provisions of this sub-division (C) the application of any payment required thereby on any November 27 in respect of the Series A Debentures pursuant to sub-paragraph (b) of Section 6.01 (A) or in respect of the Series B Debentures pursuant to sub-paragraph (b) of Section 6.01 (B) would cause the amount paid in respect of the Series A Debentures to be in excess of the aggregate principal amount thereof at the time outstanding or would cause the amount paid in respect of the Series B Debentures to be in excess of the aggregate principal amount thereof at the time outstanding less the amount required to be paid on such November 27 pursuant to sub-paragraph (a) of Section 6.01 (B), no payment of such excess amount need be made by the Company.

"(D). The dates on which such payments are so to be made pursuant to subdivisions (A) (B) and (C) of Section 6.01 are herein called '*sinking fund payment dates.*'

"The Company will pay to the Trustee, together with each such payment, an additional sum in cash equal to six (6) months' interest on a principal amount [fol. 20609] of Debentures equal to such payment, which additional sum shall be applied to the payment of interest accrued on the Debentures in this *Article VI* required to be redeemed.

"At least forty days prior to each November 27, commencing November 27, 1948, the Company shall deliver to the Trustee a certificate signed by an independent public accountant or firm of independent public accountants appointed by the Company and satisfactory to the Trustee (who may be the public accountants regularly employed by the Company to audit and examine its books), stating whether or not the Company is obligated pursuant to Section 6.01 (C) to make any payment pursuant to sub-paragraph (b) of Section 6.01 (A) or sub-paragraph (b) of Section 6.01 (B) and the amount of such payment, if required, and showing in reasonable detail the computations upon which such certificate is based.

"The Company shall have the right, subject to the conditions hereinafter contained, to satisfy any sinking fund obligation, in whole or in part, by delivering to the Trustee for the sinking fund, Debentures theretofore issued and outstanding hereunder of the Series of Debentures for the retirement of which such sinking fund was established, together with all coupons appertaining thereto and unmatured at the time of such delivery, and the Trustee shall credit such sinking fund obligation with an amount equal to the principal amount of the Debentures so delivered plus six months' interest thereon. All registered Debentures without coupons and all coupon Debentures registered as to principal so delivered, if not registered in the name of the Company, shall be accompanied by duly executed written instruments of transfer in favor of the Company. If the Company elects so to deliver Debentures for credit on any sinking fund obligation required or permitted to be made on any May 28 or November 27, as the case may be, it shall deliver such Debentures (together with, in the case of coupon Debentures, all unmatured coupons thereto appertaining) to the Trustee, at least forty days prior to said May 28 or November 27, as the case may be, and also a written notice of such election, signed by the Treasurer or an Assistant Treasurer of the Company, specifying the aggregate principal amount of Debentures so delivered and the distinctive numbers thereof. In case of the failure of the Company, at or before the time so required, to deliver such Debentures or to give such notice, the sinking fund obligation required to be made shall be paid entirely in money.

[fol. 20610] "Forthwith after the fortieth day prior to said May 28 or November 27, as the case may be (commencing May 28, 1948), the Trustee shall proceed to select for redemption, from the Series A and/or Series B Debentures, as the case may be, then remaining outstanding and otherwise in the manner provided in *Article V*, a principal amount of Debentures equal to the aggregate principal amount of Debentures redeemable with the money required to be paid as hereinbefore provided in satisfaction of the then next maturing sinking fund obligation, and, for and on behalf of and in the name of the Company, shall give notice by publication, mail or both, as may be required by the provisions of *Article V,* of the redemption for the sinking fund on the then next ensuing June 1 or December 1, as the case may be, of the Debentures so selected. On or before the sinking fund payment date next preceding any June 1 or December 1, as the case may be, upon which any Debentures shall have been so called for redemption for the sinking fund, the Company shall pay to the Trustee the sum required to redeem the Debentures so called. All moneys paid to the Trustee as in this *Article VI* provided shall be by it applied to the redemption of the Debentures so called for redemption for the sinking fund.

"If May 28 or November 27, as the case may be, shall in any year fall on a Sunday or holiday, then any payment required to be made on or before such date pursuant to the provisions of this *Article VI* shall be made on or before the last regular business day next preceding such May 28 or November 27, as the case may be.

"If the fortieth day prior to May 28 or November 27, as the case may be, in any year shall fall on a Sunday or holiday, then any delivery of Debentures or instrument required or permitted to be made on or before such fortieth day pursuant to the provisions of this *Article VI* may be made on or before the next succeeding regular business day."

Section Sixteen. Sub-paragraph (c) of Section 7.01 of the Indenture is hereby amended to read as follows:

"(c) If default shall be made in the due and punctual payment or satisfaction of any sinking fund obligation, when and as such sinking fund obligation shall become due and payable as in this Indenture expressed, and such default shall have continued after the first day of the month next following the date on which such sinking fund obligation became due and payable; or" [fol. 20611] Section Seventeen. Article VII of the Indenture is hereby amended by adding thereto the following new Section:

> "SECTION 7.15. The provisions of the Subordinated Notes made for the benefit of the holders of the Debentures may be enforced by the Trustee without production of the Debentures, and any moneys collected through the enforcement of such provisions shall be deemed to be moneys collected by the Trustee under this *Article VII* and shall be applied in accordance with *Section 7.03.*"

ARTICLE TWO.

Stamping and Change of Form of the Debentures.

The Debentures now outstanding and the Debentures hereafter issued in exchange therefor or in place thereof shall (unless textually revised as hereinafter provided) be stamped or typewritten with a notation substantially as follows:

> "The terms of this Debenture and of the Indenture dated as of December 1, 1945, referred to in this Debenture have been amended by a Second Supplemental Indenture dated as of January 15, 1947, executed and delivered with the consent of the holders of all of the Debentures at the time outstanding under said Indenture. Reference is hereby made to such Second Supplemental Indenture."

All outstanding Debentures shall be stamped or typewritten with the notation as aforesaid by or under the supervision of the Trustee at its principal office in the Borough of Manhattan, The City of New York. Having been stamped or typewritten with the notation as aforesaid, such Debentures so stamped or typewritten shall be promptly redelivered by the Trustee to, or upon the order of, the bearers or registered owners thereof.

Any coupon Series B Debenture at any time hereafter issued in exchange for or in place of any Series B Debenture heretofore issued shall, and, if the Company so elects or if the bearer or registered owner of such Debenture so requests in writing, any other Debenture at any time hereafter issued in exchange for or in place of any thereof heretofore issued shall, be textually revised in form approved by the Trustee to make reference to this Second [fol. 20612] Supplemental Indenture and to make any other textual changes deemed appropriate by the Trustee to conform to the changes made by this Second Supplemental Indenture, instead of being stamped or typewritten as hereinabove provided, all at the expense of the Company.

ARTICLE THREE.

Concerning the Trustee.

The Trustee accepts the modifications of the trust hereby effected but only upon the terms and conditions set forth in the Indenture as amended by this Second Supplemental Indenture. Without limiting the generality of the foregoing, the Trustee assumes no responsibility for the correctness of the recitals of fact herein contained which shall be taken as the statements of the Company. The Trustee makes no representations and shall have no responsibility as to the validity of this Second Supplemental Indenture.

ARTICLE FOUR.

Miscellaneous.

Section One. Except as hereby expressly amended, the Indenture and the Debentures outstanding thereunder are in all respects ratified and confirmed and all the terms, provisions and conditions thereof shall be and remain in full force and effect.

Section Two. This Second Supplemental Indenture may be executed in any number of counterparts, each of which shall be deemed an original and such counterparts shall constitute but one and the same instrument.

Section Three. This Second Supplemental Indenture shall be deemed effective as of January 15, 1947.

In Witness Whereof, Transcontinental & Western Air, Inc., has caused this Second Supplemental Indenture to be signed in its corporate name by its President or one of its Vice-Presidents and its corporate seal to be hereunto [fol. 20613] affixed and attested by its Secretary or one of its Assistant Secretaries, and The Commercial National Bank and Trust Company of New York has caused this Second Supplemental Indenture to be signed in its corporate name by one of its Vice-Presidents and its corporate seal to be hereunto affixed and attested by one of its Trust Officers or Assistant Trust Officers, all as of the day and year first above written.

Transcontinental & Western Air, Inc.,
By ....
Vice-President

Attest:

....
Assistant Secretary

The Commercial National Bank and
Trust Company of New York,
as Trustee,
By ....
Vice-President

Attest:

....
Trust Officer

[fol. 20614]

State of New York, }
County of New York, } ss.:

On the day of , in the year 1947, before me personally came , to me known, who, being by me duly sworn, did depose and say that he resides at ; that he is a Vice-President of Transcontinental & Western Air, Inc., one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said Corporation; that the seal affixed to said instrument bearing the corporate name of said Corporation is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation; and that he signed his name thereto by like order.

State of New York, } ss.:
County of New York, }

On the day of , in the year 1947, before me personally came , to me known, who, being by me duly sworn, did depose and say that he resides at ; that he is a Vice-President of The Commercial National Bank and Trust Company of New York, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said Trust Company; that the seal affixed to said instrument bearing the corporate name of said Trust Company is such corporate seal; that it was so affixed by order of the Board of Directors of said Trust Company; and that he signed his name thereto by like order.

[fol. 20615]

Exhibit B to Defendants' Exhibit No. 132

Transcontinental & Western Air, Inc. (hereinafter called the "Corporation"), a Delaware corporation, for value received, hereby promises to pay, at its office in Kansas City, Missouri, to the order of Hughes Tool Company on June 2, 1956, the sum of

;

and to pay interest on said principal sum from the date hereof at the rate of 2¾% per annum, payable, to the extent hereinbelow provided, on June 2, 1948, and thereafter annually on June 2 in each year (each such June 2 being hereinafter called an "Interest Date") until payment of such principal sum has been made or duly provided for.

This Note is one of the Notes of the Corporation, designated as its Subordinated Convertible 2¾% Notes (hereinafter called the "Notes"), referred to in the Three-Party Agreement, dated January 31, 1947, between Hughes Tool Company, the Corporation and The Equitable Life Assurance Society of the United States.

No interest shall become due and payable on any of the Notes on any Interest Date prior to June 2, 1956 unless, after giving effect to the interest payment then proposed, the sum of all interest payments then or theretofore made on all the Notes will not be in excess of an amount equal to (x) the Net Income of the Corporation (as defined, and ascertained and determined as provided, in the Indenture, as heretofore supplemented, between the Corporation and The Commercial National Bank and Trust Company of New York, as Trustee, dated as of December 1, 1945) for the period from December 31, 1946 to the end of the fiscal year next preceding said Interest Date, plus (y) the aggregate amount of interest on all the Notes deducted in determining such Net Income of the Corporation for such period, minus (z) the aggregate principal amount of all Sinking Fund obligations of the Corporation required under said Indenture (as the same may hereafter be supplemented pursuant to said Three-Party Agreement) to be paid or satisfied prior to said Interest Date and any such obligations required to be paid or satisfied on the November 27 next succeeding said Interest Date. Interest payments on the Notes shall be made ratably on each of the Notes. Interest on this Note shall be fully cumulative, whether or not such interest shall become due and payable as hereinabove provided, and all interest hereon which shall not have been paid prior to June 2, 1956, shall become due and payable on June 2, 1956. Accumulations of interest prior to June 2, 1956 shall not bear interest.

The holder of this Note may, at any time prior to the maturity hereof, convert such Note into full paid and nonassessable shares of the Corporation's common stock having a par value of $5 per share (hereinafter called "common stock") at a price which shall be determined as hereinafter provided, and otherwise upon the terms and subject to the conditions hereinafter specified, upon the surrender to the Corporation at its office in Kansas City, Missouri, of such Note, accompanied by a written notice to the Corporation that such holder elects to convert such Note in accordance with the provisions hereof. The date of conversion shall be deemed to be the date of the surrender of such Note and the price per share at which such conversion shall be effected (hereinafter called the "conversion price") shall be the average of the prices at which the last sale of the Corporation's common stock was made on the New York Stock Exchange on each of the last ten business days of such Exchange preceding the date of receipt by the Corporation of notice of the exercise of such option, unless such average shall be less than the par value thereof, in which event the conversion price shall be such par value. Upon any such conversion, the Corporation, at the option of the holder of such Note, either (a) shall issue to such holder its common stock, taken at the same conversion price, equivalent in amount to such unpaid accumulated interest, to the extent that common stock is available therefor, or (b) shall agree to pay such holder in cash all unpaid interest accumulated on such Note to the date of conversion, such interest to become due and payable on June 2, 1956, or on such earlier Interest Date or Dates on which such interest would have become due and payable in accordance with the provisions of such Note, all as if such Note had not been converted, and shall issue a non-interest bearing promissory note for [fol. 20616] the amount of such unpaid interest, which promissory note shall contain subordination provisions substantially in the same form as those hereinbelow set forth. If any fractional interest in a share of common stock shall be remaining upon the conversion hereof, the Corporation shall purchase such fractional interest for an amount determined by the conversion price multipled by such fraction. The person or persons who shall be entitled to receive common stock issuable upon conversion shall be deemed to have become the record holder or record holders thereof on the date of conversion. All shares of common stock issued upon the conversion of this Note pursuant to any of the provisions hereof shall be subject to the provisions of paragraphs 5 and 6 of said Three-Party Agreement and (i) if the Voting Trust Agreement therein provided for shall not have been executed and delivered, the certificates for said shares shall upon the issuance thereof be inscribed in the manner provided in said paragraph 6 or (ii) if said Voting Trust Agreement shall have been executed and delivered, said shares shall be immediately subjected thereto.

In case of any classification, reclassification, or other reorganization of the common stock of the Corporation, or in case of the consolidation or merger of the Corporation with or into another corporation, or the conveyance to another corporation of all or any major portion of the assets of the Corporation, then, as part of such classification, reclassification, reorganization, consolidation, merger or conveyance, adequate provision shall be made whereby the holders of Notes upon the exercise of the conversion privilege shall be entitled to receive on the same conditions the stock, securities or other property which such holders would have been entitled to receive upon such classification, reclassification or other reorganization, consolidation, merger or conveyance, if such holder had exercised the conversion privilege immediately prior to such classification, reclassification or other reorganization, consolidation, merger or conveyance; and, as a condition of any such consolidation, merger or conveyance, any corporation which shall become successor to the Corporation by reason of such consolidation, merger or conveyance shall expressly assume the obligation to deliver, upon the exercise of the conversion privilege, such shares of stock, securities or other consideration as the holders of Notes shall be entitled to receive pursuant to the provisions hereof; and in any such case provision shall be made so that all of the terms and provisions for conversion of the Notes shall be binding upon such successor, and such provisions shall similarly apply to successive consolidations, mergers and conveyances of or by any such successor.

This Note is issued and delivered subject to the following additional terms and conditions, to all of which the payee hereof and any and all subsequent holders hereof by acceptance of this Note agree.

The Corporation, at its option, may require the holder hereof by notice in writing of its election so to do, mailed on January 1, 1950 to such holder at his address appearing upon the books of the Corporation or at such other address as he may have filed with the Treasurer of the Corporation for the purpose of receiving payment of any amounts in respect of principal or interest on this Note, to convert this Note into full paid and non-assessable shares of the common stock of the Corporation. In such event the date of conversion shall be deemed to be January 1, 1950 and the price per share at which conversion shall be effected shall be the average of the prices at which the last sale of the Corporation's common stock was made on the New York Stock Exchange on each of the last ten business days of such Exchange preceding January 1, 1950, unless such average shall be less than the par value thereof, in which event the conversion price shall be such par value. Except as other provision is made therefor in this paragraph, the provisions of this Note with respect to conversion at the option of the holder shall apply equally to conversion at the option of the Corporation.

This Note and the indebtedness represented hereby, except any interest thereon which may become due and payable in accordance with the provisions hereof, shall be subordinate and subject in right of payment to the prior payment in full of all the Sinking Fund Debentures, due December 1, 1955 and June 1, 1956, of the Corporation, as the same have heretofore been, and as the same may, with the consent of the holders thereof and without any notice to the holder hereof, hereafter be, amended, modified or supplemented and to the prior payment in full of all obligations of the Corporation arising out of any advances, not in excess of $40,000,000, which may hereafter be made to [fol. 20617] the Corporation by the Reconstruction Finance Corporation, as the same may be made, extended, renewed or refunded. The Corporation has covenanted not to make, and the holder hereof by acceptance hereof covenants not to receive, any payment of or on account of this Note before the payment in full of all said Debentures and said advances by the Reconstruction Finance Corporation, except any interest hereon which may become due and payable in accordance with the provisions hereof; and any payment made hereon in violation of said covenants shall be, and for all purposes shall be conclusively deemed to be, held in trust by the party receiving such payment for the benefit of the holders of said Debentures and/or the Reconstruction Finance Corporation, as their interests may appear. In the event of any bankruptcy, receivership, reorganization or other insolvency proceedings involving the payment to creditors of the Corporation of proportionate distributions, the holder hereof shall be entitled to take such steps as may be required by law to file and prove and collect upon all indebtedness evidenced hereby, and such holder by acceptance hereof agrees, for the benefit of the holders of said Debentures and the Roconstruction Finance Corporation, to take such steps and to pay over to the holders of said Debentures and/or the Reconstruction Finance Corporation, as their interests may appear, any and all distributions or other payments received, in any such bankruptcy, receivership, reorganization or other insolvency proceedings, in respect of the indebtedness evidenced hereby, up to the amount required to cause said Debentures and said advances by the Reconstruction Finance Corporation, including in each case all interest thereon, to be paid in full. The provisions hereof made for the benefit of the holders of said Debentures may be enforced by the Trustee under the above-mentioned Indenture without the production of said Debentures.

The payee of this Note shall be deemed to be the holder hereof for all purposes unless and until there is delivered to the Corporation at its office in Kansas City, Missouri, an instrument, in form satisfactory to the Corporation, transferring this Note to another person, and the Corporation is notified in writing of the address of such other person, in which event such other person shall be deemed to be the holder hereof for all purposes unless and until transfer is thereafter similarly effected to another person.

The payee hereof and any and all subsequent holders hereof by the acceptance hereof each for himself hereby represents and agrees that, upon the exercise of either of the options herein contained to convert this Note into common stock of the Corporation, he will acquire such stock for investment as a part of his business and not with a view to distribution; and, in connection with the exercise of either of such options, and as a condition to the obligation of the Corporation to deliver certificates representing stock into which this Note shall thereby be converted, the payee or any other person becoming the owner of such stock by reason of such conversion, shall execute and deliver his written representation to, and agreement with, the Corporation that he is acquiring such stock for investment as a part of his business and not with a view to distribution, unless at the time a registration statement concerning the sale of the stock into which this Note is converted shall be in effect under the Securities Act of 1933.

If default is made in the payment of the principal or interest of this Note at maturity, and the same is placed in the hands of an attorney for collection, or if collected through the bankruptcy or other court, then and in that event the holder hereof shall be entitled to recover a reasonable additional amount as attorneys' fees.

Dated: , 1947.

TRANSCONTINENTAL & WESTERN AIR, INC.

By ....

and ....

[fol. 20618]

EXHIBIT C TO DEFENDANTS' EXHIBIT NO. 132

VOTING TRUST AGREEMENT

Common Stock

TRANSCONTINENTAL & WESTERN AIR, INC.

Dated, , 19 .

....

....

....

Voting Trustees

Delaware Trust Company, Agent

[fol. 20619] AGREEMENT, dated , 19 , between TRANSCONTINENTAL & WESTERN AIR, INC. (hereinafter called the "Corporation"), a Delaware corporation, party of the first part, and , and , the survivors or survivor of them and their respective successors appointed as in this Agreement provided, as Voting Trustees (hereinafter called the "Voting Trustees"), parties of the second part, and HUGHES TOOL COMPANY (hereinafter called "Hughes Tool"), a Delaware corporation, party of the third part.

WHEREAS, the Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with an authorized capital stock of $; consisting of ; and

WHEREAS, The Equitable Life Assurance Society of the United States (hereinafter called the "Equitable") a New York corporation, is the owner of $, principal amount, of the Corporation's Sinking Fund Debentures (hereinafter called the "Debentures") issued under an Indenture dated as of December 1, 1945 (hereinafter called the "Indenture"), as supplemented; and

WHEREAS, under and by virtue of the provisions of a certain agreement dated January 31, 1947, between Hughes Tool, the Corporation and the Equitable, as owner of the Debentures, Hughes Tool and the Corporation are obligated to join in the execution and delivery of this Agreement and Hughes Tool is obligated to deposit or cause to be deposited hereunder certificates for shares of common stock of the Corporation being all shares of said common stock owned by Hughes Tool on, or acquired or deemed to have been acquired by Hughes Tool at any time after, January 31, 1947 [except shares of said common stock transferred by Hughes Tool by a sale in connection with which a registration statement became effective under the Securities Act of 1933, as amended, and except of shares which are subject to options originally granted to Jack Frye]; and

NOW, THEREFORE, a voting trust in respect of the common stock of the Corporation is hereby created and established [fol. 20620] subject to the following terms and conditions, to all and every one of which the parties hereto expressly assent and agree:

FIRST: Hughes Tool agrees that concurrently with the execution and delivery of this Agreement it will transfer and assign, or cause to be transferred and assigned, to the Voting Trustees shares of common stock of the Corporation and will deposit or cause to be deposited hereunder with the hereinbelow mentioned Agent (hereinafter called the "Agent") of the Voting Trustees the certificates for such shares, all of which certificates, if not registered in the name of the Voting Trustees, shall be duly endorsed in blank or accompanied by proper instruments of assignment and transfer thereof duly executed in blank with signatures guaranteed and in either case properly stamped for transfer.

SECOND: Hughes Tool agrees that if it shall hereafter acquire any shares of common stock of the Corporation, in addition to those hereinabove mentioned, it will transfer and assign, or cause to be transferred and assigned, to the Voting Trustees such additional shares and will deposit or cause to be deposited hereunder with the Agent the certificates for such additional shares, which certificates, if not registered in the name of the Voting Trustees, shall be duly endorsed in blank or accompanied by proper instruments of assignment and transfer thereof duly executed in blank with signatures guaranteed and in either case properly stamped for transfer. [For the purposes of this Article Second, all shares of common stock of the Corporation issued upon the conversion of any of the Subordinated Convertible 2¾% Notes of the Corporation, whether or not the Notes so converted shall at the time be held by Hughes Tool, shall be deemed to constitute shares acquired by Hughes Tool at the time of such conversion.] [For the purposes of this Article Second, upon the expiration of any of said options originally granted to Jack Frye, or any extensions thereof, all shares remaining unpurchased under said expiring option shall be deemed to have been acquired by Hughes Tool at the time of such expiration.]

THIRD: The Voting Trustees shall from time to time issue in respect to the common stock of the Corporation so deposited hereunder with the agent a Voting Trust Certificate or Voting Trust Certificates for a like number of [fol. 20621] shares of such common stock, in substantially the following form and registered in the name of Hughes Tool or in such name as shall be specified in writing by Hughes Tool:

No. .... Shares

TRANSCONTINENTAL & WESTERN AIR, INC.

Voting Trust Certificate For Common Stock

THIS TO CERTIFY THAT

will, upon the termination of the Voting Trust Agreement hereinafter mentioned and subject to the provisions thereof, upon surrender hereof and upon payment of any stamp tax or other charge in connection with the delivery, be entitled to receive a certificate or certificates, expressed to be fully paid, for shares, of the par value of $5 each, of the common stock of Transcontinental & Western Air, Inc. (hereinafter called the "Corporation"), a Delaware corporation, heretofore deposited under said Agreement, and is in the meantime entitled to receive payments equal to the cash dividends, if any, collected by or for the account of the Voting Trustees hereinafter named, or their successors, upon a like number of shares, and to receive Voting Trust Certificates (or scrip therefor) in respect of any dividends payable in common stock of the Corporation so collected.

This certificate is issued under and the rights represented hereby are subject to, and each successive holder hereof by accepting the same consents and agrees to be bound by, all the terms and conditions of a certain Voting Trust Agreement dated ...., 19.... (hereinafter called the "Voting Trust Agreement"), by and between the Corporation, party of the first part, , and . the survivors or survivor of them and their respective successors appointed as in the Voting Trust Agreement provided, as Voting Trustees, parties of the second part, and Hughes Tool Company, a Delaware corporation, holder of certain shares of common stock of the Corporation, party of the third part. An original counterpart of the Voting Trust Agreement is on file at the principal office of the Corporation in the State of Delaware, and is open to the inspection of any holder of stock of the Corporation or of any Voting Trust Certificate daily during business hours.

No voting right passes by or under this certificate or by or under any agreement expressed or implied, it [fol. 20622] being expressly understood and agreed that, until the actual delivery of a stock certificate or certificates, to the registered owner hereof or his assigns, the Voting Trustees at any time acting under the Voting Trust Agreement shall possess and be entitled in their discretion to exercise in respect of any and all shares of stock called for by this certificate, all rights and powers of every name and nature, including the right to vote thereon and to take or omit to take any other action in respect thereof.

The Voting Trust Agreement will remain in effect until June 1, 1956 unless previously terminated as provided therein.

No stock certificate shall be deliverable in respect hereof until June 1, 1956 or until earlier termination of the Voting Trust Agreement and such delivery shall in any event be subject to the provisions of the Voting Trust Agreement.

This certificate is transferable only on the books of the Voting Trustees at the office of their Agent in the City of Wilmington, Delaware, by the registered owner in person or by attorney duly authorized and upon surrender hereof properly endorsed and payment of any taxes imposed by law on such transfer, and otherwise as provided in the Voting Trust Agreement. Title to this certificate, when duly endorsed, shall to the extent permitted by law be transferable with the same effect as in the case of a negotiable instrument. The Voting Trustees and their Agent may nevertheless deem and treat the registered holder hereof (or, when presented duly endorsed in blank, the bearer hereof) as the absolute owner hereof for all purposes whatsoever, and neither the Voting Trustees nor their Agent shall be affected by any notice to the contrary.

This certificate is not valid for any purpose until signed by the Agent of the Voting Trustees.

In Witness Whereof, the Voting Trustees have caused this certificate to be signed by their duly authorized Agent.

Dated

....

....

....

Voting Trustees.

By Delaware Trust Company,
Agent

By ....

[fol. 20623] Such certificates shall have a form of assignment on the back thereof in substantially the following form:

> For Value Received the undersigned hereby sells, assigns and transfers unto the within certificate and all right, title and interest represented thereby, and irrevocably constitutes and appoints attorney to transfer the same on the books of the Voting Trustees with full power of substitution in the premises.

The Voting Trustees may make such changes in the forms of such certificates and may add or append such legends or endorsements thereon as may be required by the rules of any stock exchange on which application may be made to list such certificates or to conform to any usage.

Fourth: As hereinafter in Article Eighth contemplated, the Voting Trustees may also issue scrip (hereinafter included within the term "Voting Trust Certificates", unless otherwise indicated and specifically referred to as "scrip") representing fractional interests in respect of Voting Trust Certificates, which scrip shall be in bearer form and transferable by delivery and unless otherwise expressly stated shall have only the rights (1) of exchange for full Voting Trust Certificates and (2) to participate, upon the termination of this Agreement, proportionately in the stock or avails thereof held for the benefit of such scrip. Such scrip shall be of such tenor and form, not inconsistent with the provisions hereof, as the Voting Trustees may approve.

Fifth: The Voting Trust Certificates shall be printed and shall be signed in the name of the Voting Trustees by their Agent appointed for the purpose, and shall be transferable only on the books of the Voting Trustees at the office of their Agent in the City of Wilmington, Delaware, as provided in the Voting Trust Certificates and in accordance with the rules from time to time established for that purpose by the Voting Trustees.

The transfer books may be closed by the Voting Trustees for a reasonable time prior to the payment or distribution of any dividend, as well as at any other time or for any [fol. 20624] other purpose when deemed by the Voting Trustees to be desirable. In lieu of the closing of the books against transfers of Voting Trust Certificates as aforesaid, the Voting Trustees may, if they deem it advisable, fix a date as a record date for the determination of the Voting Trust Certificate holders entitled to receive such dividends; and the owners of Voting Trust Certificates of record on such date shall exclusively be entitled to participate in the distribution of such dividends.

Sixth: In case any Voting Trust Certificate shall become mutilated or become lost, destroyed or stolen, the Voting Trustees may, in their uncontrolled discretion, issue and deliver in exchange therefor and upon cancellation of the mutilated Voting Trust Certificate, or in lieu of the lost, destroyed or stolen Voting Trust Certificate, a new Voting Trust Certificate representing the same number of shares of stock, upon the production of evidence of such loss, destruction or theft, satisfactory to the Voting Trustees, and upon receipt of indemnity satisfactory to them, and upon compliance also with such other reasonable regulations as they may prescribe.

Seventh: The certificates for common stock of the Corporation deposited with the Agent of the Voting Trustees shall, if not registered in the name of the Voting Trustees, be surrendered and cancelled and new certificates therefor issued to the Voting Trustees. In all certificates issued in the name of the Voting Trustees it shall appear that they are issued pursuant to this Agreement, and in the entry of such ownership in the books of the Corporation that fact shall also be noted.

Such stock shall be held, used and applied by the Voting Trustees and their successors in office for the purposes of and in accordance with this Agreement.

The Voting Trustees may cause any stock at any time held by them under this Agreement to be transferred to any name or names other than the name of the Voting Trustees herein named, if such transfer becomes necessary by reason of any change in the persons holding the office of Voting Trustees as hereinafter provided or by reason of any statutory requirement relative to directors' qualifying shares.

[fol. 20625] EIGHTH: Until the termination of this Agreement and the delivery as hereinafter provided of stock certificates in exchange for Voting Trust Certificates, each registered owner of a Voting Trust Certificate shall be entitled from time to time to receive payments equal to cash dividends, if any, collected by or for the account of the Voting Trustees upon the number of shares of stock called for by such Voting Trust Certificate, and to receive Voting Trust Certificates (or scrip therefor) in respect of any dividends payable in common stock of the Corporation so collected.

Any dividends received by the Voting Trustees other than cash dividends or dividends payable in common stock of the Corporation shall as soon as conveniently possible be transferred to and distributed among the registered owners of Voting Trust Certificates in accordance with their respective interests therein, all at such time and in such manner as the Voting Trustees shall determine is appropriate.

In case any additional capital stock of the Corporation hereafter authorized shall be offered to the common stockholders for subscription, then in such case the Voting Trustees shall immediately notify the registered owners of Voting Trust Certificates that such offer has been made and of the terms thereof and the period within which such stock may be subscribed and paid for; and upon receiving from the registered owner of any Voting Trust Certificate within the period fixed by the Voting Trustees for such purpose a request to subscribe in his behalf and the money required to pay for a stated amount of such increased stock (not in excess of the ratable amount subscribable by such registered owner in respect of the stock represented by such Voting Trust Certificate), the Voting Trustees will make such subscription and payment, and upon receiving from the Corporation the certificate or certificates for any common stock of the Corporation so subscribed for, will issue Voting Trust Certificates (or scrip therefor) in respect thereof to such owner, and upon receiving from the Corporation the certificate or certificates for any stock of the

Corporation, other than common stock, so subscribed for, will deliver such certificate or certificates to such owner. The Voting Trustees shall not be required to make any such subscription or payment or issue unless provided with [fol. 20626] funds and reimbursed for any tax or other expense which may be incurred by them or may exist in connection therewith; and shall in no event be required to make any such subscription in respect of deposited shares represented by scrip. The Voting Trustees shall have full power and discretion to prescribe and regulate any and all details in connection with such subscription rights and the exercise thereof and may in their discretion issue subscription warrants covering such subscription rights and determine whether and upon what conditions such warrants may be assigned and transferred.

Ninth: The Voting Trustees may adopt their own rules of procedure. The action of a majority of the Voting Trustees for the time being in office taken at a meeting, or taken without a meeting by a writing signed by such a majority, shall, except as otherwise herein specifically provided, constitute the action of the Voting Trustees and have the same effect as though taken by all the Voting Trustees. Any Voting Trustee may vote or may act in person or by his proxy given to any other Voting Trustee or Voting Trustees or to any other person or persons. Any Voting Trustee may act as a director or officer of the Corporation and may vote for himself as such, and he or any firm of which he is a member or any corporation of which he may be a stockholder, director, officer, agent or employee may purchase, sell, own, hold or deal in Voting Trust Certificates, and may contract with the Corporation or be or become pecuniarily interested in any manner or transaction to which the Corporation or any affiliated company may be a party or in which the Corporation may in any way be concerned, as fully and freely as though he were not a Voting Trustee.

Tenth: The Voting Trustees assume no liability as stockholders, their interest hereunder being that of trustees merely. In voting the stock represented by the stock certificates held by them hereunder (which they may do either in person or by proxy to any one or more of them or to any other person or persons or to his or their substitute or substitutes), the Voting Trustees will exercise their best judgment to secure the election of suitable directors of the Corporation, to the end that its business and affairs shall be properly managed, and the Voting Trustees will likewise vote and act in other matters in accordance with their best [fol. 20627] judgment; but they assume no responsibility in respect of such management or in respect of any action taken by them or taken in pursuance of their vote so cast, and no Voting Trustee shall incur any responsibility as trustee or otherwise by reason of any error in law, mistake of judgment, or of any matter or thing done or suffered or omitted to be done under this Agreement except for his own individual malfeasance.

The Voting Trustees assume no responsibility with respect to the validity or genuineness of any of the stock certificates (or other securities received in lieu thereof) deposited with them hereunder or of any notice, request, assignment, power of attorney, acknowledgment or other paper or document, and they shall be entitled to assume that any such stock certificates (or other securities) so deposited with them and any such other paper or document are genuine and valid and what they purport to be and have been signed by the proper parties or party and that any endorsements and assignments thereof are genuine and legal; and in making delivery of stock certificates (or other securities or cash received in lieu thereof), upon the surrender of Voting Trust Certificates representing the same, the Voting Trustees shall be entitled to deliver any stock certificates (or other securities received in lieu thereof) purporting and believed by the Voting Trustees to be genuine and legal.

The Voting Trustees may retain counsel to advise and represent them in any and all matters arising under this Agreement and may employ and fix the compensation of accountants and other agents who may do or perform any acts in behalf of the Voting Trustees within the scope of their respective agencies which the Voting Trustees are authorized hereunder to do or perform, and the reasonable charges of such counsel and other disbursements and expenses made or incurred by the Voting Trustees in the administration of their trust hereunder, including all taxes or other governmental charges involved in the transfer or issuance of any stock or Voting Trust Certificates or subscription warrants or in respect of the ownership of the stock (or other securities received in lieu thereof) held by them as trustees or in respect of any dividends, distributions or other rights in respect of such stock (or other securities) and the expenses of printing the Voting Trust Certificates (and scrip therefor) shall be borne and [fol. 20628] promptly paid by the Corporation, and the Corporation hereby agrees to pay or advance the same forthwith from time to time upon the demand of the Voting Trustees. The Voting Trustees may pay any taxes which they shall lawfully be required to pay out of any funds in their hands or of any dividends or distributions and shall have a lien with interest for any sums so paid upon the respective shares of stock (or other securities) or dividends or distributions held by the Voting Trustees upon which any such tax may be applicable.

The Voting Trustees shall be entitled to receive and the Corporation will pay reasonable compensation for their services hereunder, in such amount as the Board of Directors of the Corporation shall determine.

Eleventh: Until the termination of this Agreement and the actual delivery of stock certificates or the avails thereof in exchange for Voting Trust Certificates hereunder, the Voting Trustees shall possess and shall be entitled in their discretion, not subject to any review, to exercise in person or by their proxy, in respect of any and all shares of common stock at any time deposited under this Agreement all rights and powers of every name and nature, including the right to vote thereon or to consent to any and every act of the Corporation.

Without in anywise limiting the generality of the foregoing and except as aforesaid, the Voting Trustees are specifically authorized in the exercise of their sole and absolute discretion in respect of any and all common stock at any time deposited under this Agreement to vote for or consent to: the election of directors of the Corporation, any increase, reduction or reclassification of the capital stock of, or any reduction of the capital of, the Corporation, any changes or amendments in or to the Certificate of Incorporation of the Corporation, the sale or disposal in any manner of all or any part or parts of the property, assets or business of the Corporation, any merger or consolidation of the Corporation with any other corporation, and any reorganization of the Corporation, and any action with respect to any of the foregoing which any stockholder might lawfully take, and upon any such increase, reduction or reclassification of stock, reduction of capital or merger, consolidation or reorganization becoming effective, to make such surrender of common stock of the Corporation de- [fol. 20629] posited under this Agreement as may be proper or expedient and to receive and hold under this Agreement in lieu thereof any and all stock issued in exchange for such surrendered stock, and thereafter, in the discretion of the Voting Trustees, they may receive and appropriately issue Voting Trust Certificates against other stock issued pursuant to any such corporate change. For all purposes of this Agreement any such stock so received by the Voting Trustees in exchange for stock so surrendered shall take the place of the stock so surrendered by them.

Twelfth: Any Voting Trustee may at any time resign by filing at the principal office of the Corporation in the State of Delaware his resignation in writing, and such resignation shall be effective without any acceptance thereof.

or any successor to

(and such successor's successor and so on in line of succession) may be removed by the registered owners of a majority in interest of the Voting Trust Certificates at the time outstanding by an instrument or concurrent instruments signed by such owners or their duly authorized attorneys-in-fact and filed at said principal office of the Corporation.

or or any successor to

or (and such successor's successor and so on in line of succession) may be removed by the Equitable by an instrument signed by or on behalf of the Equitable and filed at said principal office of the Corporation.

In the event of the resignation, removal, death or inability to act of any Voting Trustee a vacancy shall be deemed to exist in his office and such vacancy may be filled at any time by the appointment of a successor in the manner hereinafter provided.

Any successor to (and such successor's successor and so on in line of succession) shall be appointed by the registered owners of a majority in interest of the Voting Trust Certificates at the time outstanding by an instrument or concurrent instruments signed by such owners or their duly authorized attorneys-in-fact and filed at said principal office of the Corporation.

Any successor to or (and such successor's successor and so on in line of succes- [fol. 20630] sion) shall be appointed by the Equitable by an instrument signed by or on behalf of the Equitable and filed at said principal office of the Corporation.

As promptly as possible after the filing at said principal office of the Corporation of any such instrument of resignation or removal of any Voting Trustee or any such instrument appointing a Voting Trustee, the Corporation shall mail notice thereof to the Agent and to the other Voting Trustee or Voting Trustees at the last known address of such other Voting Trustee or Voting Trustees.

If any vacancy in the office of a Voting Trustee shall have continued for more than 10 days the remaining Voting Trustee or Voting Trustees may exercise all the rights, powers and privileges of the Voting Trustees hereunder.

Any successor Voting Trustee appointed as herein provided shall indicate his acceptance of such appointment by signing the counterpart of this Agreement on file at said principal office of the Corporation and thereupon such successor shall be vested with all the rights, powers, duties and immunities herein conferred upon the Voting Trustees as though such successor had been originally a party to this Agreement as a Voting Trustee. The term "Voting Trustees" as used in this Agreement and in the Voting Trust Certificates issued hereunder shall apply to and mean the parties of the second part hereto, the survivors or survivor of them and their respective successors.

Thirteenth: This Agreement shall terminate on the earliest of the following dates, namely: (a) June 1, 1956, (b) the date on which the trustee under the Indenture, as supplemented, shall execute an instrument acknowledging satisfaction of and discharging the same, or (c) the date on which there shall be delivered to the Corporation an instrument signed by or on behalf of the Equitable terminating this Agreement.

Fourteenth: Upon the termination of this Agreement the Voting Trustees in exchange for and upon surrender of any Voting Trust Certificate then outstanding shall, in accordance with the terms hereof and upon payment, if the Voting Trustees shall so require, of a sum sufficient to reimburse them for any tax or other governmental [fol. 20631] charge in connection with such delivery, deliver certificates for common stock of the Corporation to the amount called for by such Voting Trust Certificate, and the Voting Trustees may require the holder of such Voting Trust Certificate to surrender the same for such exchange. Nothing in this Article Fourteenth or elsewhere in this Agreement contained shall, however, be construed to deprive the Voting Trustees, or their nominee or nominees, of the right as record holder or holders of the deposited shares to vote the same and to execute consents with respect thereto, notwithstanding the termination of this Agreement, so long as they shall continue to be the record holders thereof.

After any termination of this Agreement as above provided, the Voting Trustees may in their discretion deposit any stock or other property then held hereunder with the Agent with authority and instructions to make delivery thereof in exchange for outstanding Voting Trust Certificates as provided in this Article Fourteenth, and thereupon all further obligations or duties of the Voting Trustees under this Agreement or any provision thereof shall cease. The Voting Trustees shall give the owners of the Voting Trust Certificates notice of any termination of this Agreement prior to June 1, 1956.

Fifteenth: All notices to be given to the owners of Voting Trust Certificates shall be given by mailing the same to the registered owners of Voting Trust Certificates addressed to their respective addresses as shown on the books of the Voting Trustees, and any notice whatsoever when mailed by or on behalf of the Voting Trustees to such registered owners of Voting Trust Certificates as herein provided shall have the same effect as though personally served on all holders of Voting Trust Certificates.

SIXTEENTH: Delaware Trust Company is hereby appointed the Agent of the Voting Trustees to receive certificates representing shares of common stock of the Corporation and to sign and issue Voting Trust Certificates in the name and as Agent of the Voting Trustees and to transfer Voting Trust Certificates. The Agent now or hereafter appointed by the Voting Trustees may resign upon 30 days' written notice to the Voting Trustees or on such [fol. 20632] shorter notice as the Voting Trustees may accept. The Voting Trustees shall have the power to remove any Agent and in case of the resignation or removal of any Agent or in case any Agent shall in any way become disqualified from acting, a successor Agent having an office in the City of Wilmington, Delaware, may be appointed by the Voting Trustees and they shall cause notice of such appointment to be given to the Corporation and to the registered owners of Voting Trust Certificates. Upon the resignation, removal or disqualification of any Agent, the Agent shall, upon payment of its proper charges, deliver the custody of the stock certificates held hereunder as well as all other property held hereunder to the successor Agent or otherwise as the Voting Trustees shall direct and the successor Agent shall have and possess all the rights and immunities of the Agent originally named herein.

The Voting Trustees and the Agent shall be full protected in acting in the discharge of any of their or its duties hereunder upon any instrument, document or paper believed by them or it to be genuine and to have been executed by the proper parties and the Agent shall be fully protected in issuing any Voting Trust Certificates hereunder, or in taking or in refraining from taking any action hereunder in reliance upon any direction or statement, purporting to be signed by the Voting Trustees or their authorized proxies, as to the existence or nonexistence of any fact or the performance or nonperformance of any act and may accept as conclusive any such statement.

The Agent shall not incur any liability to anyone by reason of anything done or permitted or omitted to be done by it at the request or direction of the Voting Trustees, or because of any disposition which it shall make at the request or direction of the Voting Trustees of any stock certificate or other document or paper or funds or property deposited with it pursuant to any of the provisions hereof, or for any action which it may take or refrain from taking in respect thereof upon like request or direction, it being the intent and purpose of this Agreement that such stock certificates, documents, papers, funds and property shall be wholly at the order of and under the control of the Voting Trustees; and no Agent of the Voting Trustees shall incur any liability whatsoever except for its own individual [fol. 20633] malfeasance in the discharge of its duties as specified in this Article Sixteenth, nor shall it be liable for negligence of its agents, officers or employees, if chosen and retained with due care. The Agent shall be entitled to reasonable compensation for its services hereunder and to be reimbursed for all expenses incurred by it hereunder, and all such reasonable compensation and expenses shall be deemed to be expenses of the Voting Trustees required to be borne and promptly paid by the Corporation as provided in Article Tenth hereof.

Seventeenth: This Agreement shall not be terminated except as provided in Article Thirteenth hereof, nor shall this Agreement be amended or modified in any respect except by an instrument or concurrent instruments in writing signed by or on behalf of the Equitable, by the Corporation, by all the Voting Trustees and by the registered owners of a majority in interest of the Voting Trust Certificates at the time outstanding or their duly authorized attorneys-in-fact and filed at the principal office of the Corporation in the State of Delaware.

Eighteenth: This Agreement may be executed in several counterparts, each of which so executed shall be deemed to be an original, and all of such counterparts shall together constitute but one and the same instrument.

Nineteenth: Until the termination of this Agreement one original counterpart hereof and of any amendment or modification hereof effected pursuant to Article Seventeenth shall be filed at the principal office of the Corporation in the State of Delaware and open to the inspection of any holder of stock of the Corporation or of any Voting Trust Certificate daily during business hours.

Twentieth: This Agreement has been made in the City of Wilmington, Delaware, and this Agreement and the trust hereby created shall be construed and governed by the laws of said State and the validity and effect of said trust and of this Agreement shall be determined in accordance with the laws of said State.

[fol. 20634] In Witness Whereof, the parties hereto have duly executed this Agreement as of the day and year first above written.

Transcontinental & Western Air, Inc.

By ....

Vice President.

Attest:

....

Secretary.

.... (L. S.)

.... (L. S.)

.... (L. S.)

Hughes Tool Company

By ....

Vice President.

Attest:

....

Secretary.

[fol. 20811]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 148

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

Securities Investment Department

Dated at New York December 6, 1950

For Mr. C. W. Dow

Subject Trans World Airlines, Inc.

Mr. Ralph Damon, President, today discussed with Mr. Dow the following program for procurement of additional aircraft:

Aircraft:	10 Lockheed Model 1049 Constellations
Cost:	$ 1,300,000 each; aggregate cost $13,000,000 plus $3,000,000 for spares
Delivery:	During 1952
Contract:	Under Lockheed Contract LD 60 under which the present order for 20 Lockheed Model 749A Constellations is being delivered. (Some reduction in cost of Model 749A aircraft will be made if Model 1049 aircraft are ordered.)
Financing:	60% through proceeds from Term Bank Loans similar to existing loans; interest rate not determined. 40% through use of Company cash funds: 25% to be paid down initially and 15% upon delivery.

Mr. Damon requested that the Society consent to the acquisition and financing of the additional aircraft.

After discussing this matter with Mr. Shailer, Mr. Dow advised Mr. Damon that the Society would give consideration to such consent on the following basis:

1. Hughes Tool Company to undertake to furnish to TWA prior to December 31, 1952 $5,000,000 in the form of equity or subordinated obligations.

2. The interest rate on the outstanding Debenture 3s to be increased to 3¼%, or to the rate on the proposed Term Bank Loans, whichever is greater.

Mr. Damon will consider the above proposal and advise us of the Company's decision.

/s/ Arthur Gilbart
Arthur Gilbart

[fol. 20991]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 162

TWA
TRANS WORLD AIRLINES, INC.
630 Fifth Avenue
New York 20, New York, U. S. A.

31 May 1951

Mr. Noah Dietrich
7000 Romaine Street
Hollywood, California

Dear Noah:

This letter is being sent to you at your request immediately following telephone conversation which we had and in which I read you the following statement over the telephone:

> I have been furnished this morning by Constable with memorandum which he advises was given to him by you emanating from controlling stockholder with specific instructions for handling our Martin delivery delay problem with the Martin Company. This supplements and expands positions previously stated by the same party.
>
> In view of a number of developments in the matter and that I feel that the matter should be handled in the best interests of TWA which best interests may require action not consistent with these instructions, including such developments as current refusal threat of our pilots to fly currently rented Martin airplanes, I intend to proceed negotiating with Martin in accordance with my best business judgment which may involve specific concessions in return for which I will endeavor to make best business judgment trade possible for TWA and its stockholders.
>
> This memorandum is being read to you over the telephone rather than dispatched by telegraph in view of the express request of the controlling stockholder not to clutter files with communications indicating conflicting internal opinions. But the basic memorandum will be sent to you by telegram if you so desire and advise.

The statement refers to the following paragraph which was given to me by Constable this morning and is in answer thereto.

> "Follow through with Damon and see that he demands, takes delivery, and flies Martins as soon as they can be physically produced, but taking all precautions in operation of same, and that he demands Martin immediately engineer and produce the necessary changes to make the aircraft completely OK and that Martin then install said changes, all without cost to TWA and with payment to TWA for operating days lost during rework: (On same basis as if delivery were delayed an equivalent amount.) Also, please see that Damon does not concede anything whatsoever to Martin, such

as waiving any free rent on planes presently being operated, or anything else whatsoever. I feel TWA must get every penalty and every other concession it is entitled to under contract whether free rent or cash or both."

[fol. 20992] I understand your position to be that these were instructions from the controlling stockholder from him to you which you passed along from you to me for information and advice and not specifically as instructions.

I must confess that the shading of difference confuses me. The net purpose of this letter is the same as that intended by the phone call namely that in the best interests of the corporation at this time it may be desirable in my best business judgment, to modify or make concessions to the Martin Company in our present contract, and, that I intend to carry out negotiations for what I believe in my best business judgment to be the best interests of TWA and its stockholders.

As I advised you over the telephone we have a telegram dated three days ago from Mr. David L. Behncke advising us that our pilots will not choose to fly the rented Martin airplanes after June 15, 1951. This matter has received no public attention and it is certainly in the interests of the corporation to avoid any publicity and if possible to avoid exercise of this action.

I have been in telephone communication with Mr. Behncke twice since receiving his telegram and have also conferred with the other officers and members of general counsel of the corporation and have also been in consultation with the Martin Co. over the issues between us which are inexorably entwined with Mr. Behncke's action. I am hopeful we may be able to avoid precipitate action by the pilots grounding the airplanes.

I hope that my actions in regard to this matter even though they may violate the specific instructions will continue to merit your confidence.

I shall endeavor to exercise the best business judgment of which I am capable.

Sincerely,

/s/ RALPH
R. S. Damon
President

[fol. 20993]

June 4, 1951

Mr. Ralph Damon
630 Fifth Avenue
New York, N.Y.

Dear Ralph:

I am confident I understand your position in the Martin matter and I am sure you understand mine.

As I told you in our telephone conversation, I see no basis for anyone taking exception to being informed of the views of one controlling 74% of the stock of TWA on any matter concerning the company. It was my responsibility to pass on such views to you and I did. This constituted no reflection on management and did not affect the degree of your responsibility as the company's President. Since I agree with the views expressed, it should, in my opinion, cause you to put me on notice if your own judgment or the circumstances would not permit you to go along with the suggestions made.

I believe further that in a situation such as this, great weight should be given to the suggestions.

Best wishes.

Sincerely yours,

ND:hmb

[fol. 20994]

TWA
Trans World Airlines, Inc.
630 Fifth Avenue
New York 20, New York, U. S. A.

11 June 1951

Mr. Noah Dietrich
7000 Romaine Street
Hollywood 38, Calif.

Dear Noah:

This will acknowledge your letter of June 4 with respect to my position in the Martin matter.

Of course I have no objection to being informed of the views of the majority stockholder of the company. In fact I would like to have such views and I would like very much to be in a position to follow them.

The point of my letter and phone conversation was that having received such views and being unable to follow them as I should like to do, other things being equal, I was unable to do so in the best interests of the company. I hope this closes the matter and I hope that in the future whenever I receive such views I will be able to follow them more closely than I was able to do in this case.

Sincerely,

/s/ Ralph
R. S. Damon
President

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 163

TWA AIRCRAFT ACQUISITIONS

1939 - 1960

Date of Contract	No.		Manufacturer and Type	Contract No.	From Whom Acquired
1939-1945			Douglas DC-2 and DC-3—Boeing 307		Douglas and Lockheed
8/20/45	18		Lockheed 049	LD-10	Lockheed
5/13/46	5		Lockheed 049	LD-22-23	Lockheed
3/27/47	4		Lockheed 049	LD-33	Lockheed
11/18/47	12		Lockheed 749	LD-42	Lockheed
10/1/48	2		Lockheed 049	—	Toolco
5/31/49	25		Lockheed 749-A	LD-60	Lockheed
2/2/50	6		Lockheed 049	—	Toolco
1949	12		Martin 202 A	—	Martin
2/22/50	40	(2 taken by Hughes)	Martin 404	#1116	Martin
12/5/50	10		Lockheed 1049	LD-75	Lockheed
9/12/53	20		Lockheed 1049-G	LD-111	Lockheed
4/1/54	2		Lockheed 649A	—	Toolco
	1		749A		
9/24/55	8		Lockheed 1049-G	LD-147	Toolco
4/23/58	4		Lockheed 1049-H	LD-208-A	Lockheed
3/29/55	25		Lockheed 1649-A	LD-138	Lockheed (13) Toolco (12)
4/23/58	4		Lockheed 1649-A	LX-163	Lockheed
3/2/56	15		Boeing 707-131	#7	Toolco
3/16/56	12		Boeing 707-331	#9	Toolco (5) Boeing (7)
9/10/56	20		Convair 880	—	Convair

[fol. 20997]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 165

December 23, 1954

TELEPHONE CONVERSATION WITH MR. HUGHES THE EVENING OF DECEMBER 22, 1954

Last evening, December 22, was the climax of several months' intensive activity which resulted in Lockheed signing contractual papers for the acquisition of twenty-five (25) Lockheed Model 1449A type aircraft by the Hughes Tool Company, with right of assignment to TWA by Hughes Tool, without Lockheed's consent.

It became apparent early in negotiations that the Model 1449A as proposed by Lockheed will be fundamentally uneconomical because the fuselage size will not permit carrying enough payload to produce sufficient revenue to have a reasonable break-even load factor. Seating capacity is virtually the same as previous models, while operating costs are substantially higher. Balancing this to some extent is the higher speed of the airplane which will tend to promote the sale of more seats than would otherwise be the case.

I have steadfastly maintained, and pointed out to TWA Management, who has concurred, and personally to Mr. Hughes, as well as to Lockheed representatives, that I believe the airplane as proposed to be an unsound project, primarily because of over-all economical aspects. I have also pointed out ways whereby this condition could be rectified by LAC making it an attractive, worthwhile project.

Numerous discussions were held with Lockheed representatives re operating costs during which period Lockheed raised its operating-cost-per-hour estimate from $486.92 to $541.95, TWA's cost-per-hour estimate being $615.58. This compares to $410.39 for the Douglas DC-7C.

These cost figures included here are for domestic operation only.

During the evening of December 22, Lockheed centered its activities in the small walnut-lined conference room downstairs to the left of the lobby at the Beverly Hills Hotel, Hughes Tool Company occupying the Promenade Room to the right of the lobby. Hughes Tool representatives were Ray Cook and Mickey West. TWA observers and commentators were Harry L. West, Ralph L. Ellinger, Edward S. McCarthy and the writer. Lockheed representatives were Leonard Schwartz, Kirk Yost, Walter Wayman, Ben Brundred and Rodgers Donaldson.

I explained a second time to Ray Cook in the Polo Lounge immediately following dinner why any present deal should be made contingent upon final resolution of the specification satisfactory to both parties, why risk associated with CAA certification warranted special contractual protection, and that Hughes Tool should not consider Lockheed's price for the airplane firm because of the very incomplete airplane specifications. My personal estimate of airplane price relayed to Mr. Cook was that each airplane would cost approximately three million dollars when delivered, rather than the $2,690,817.00 stated in the Contract.

The discussions with Ray Cook and Mickey West continued in the Promenade Room, during which time I pointed out that Contract LD-111 between TWA and Lockheed was handled in precisely the manner I was recommending in this instance, and that I estimated that this handling resulted in saving TWA a million and a half dollars in that instance. I also stated that much more would likely be saved in this instance if the same procedure were followed. In my opinion, LAC, if pushed would have agreed to this contingency. LAC's willingness to go along with this condition was confirmed by Kirk Yost following the signing. He

[fol. 20998] stated that LAC had approached Hughes several days earlier urging that no papers be signed until specifications were agreed upon and that Mr. Hughes turned this down.

CONFIDENTIAL

During the discussions, Leonard Schwartz came to the door and advised Ray Cook that Mr. Hughes was on the telephone and wanted to talk to him. Cook asked that I accompany him to the telephone in the Lockheed quarters, which I did. Cook pointed out to Hughes that I had serious objections to the form of contract being proposed and urged Hughes to discuss these points with me. Mr. Hughes, who was calling from Palm Springs, where he had arrived late that afternoon, elected to talk to me.

Howard opened the conversation by asking what I had done about the price of seats. As background information, several weeks ago Mr. Damon mentioned in a telephone conversation with Hughes that Lockheed's price was less passenger seats. Mr. Hughes asked me a day or so after his conversation with Mr. Damon if Mr. Damon's statement was correct. I replied that it was my understanding that it was, but that I would re-check the specification status and determine whether seats were still called out as C.F.E. I advised him about one day later that seats were not included. That followed a conversation with Leonard Schwartz during which time Leonard explained how Lockheed had arrived at this position. I relayed all this to Mr. Hughes, after which he instructed me to follow pricing carefully in order to advise him later of how Lockheed had arrived at its final price, and whether or not I considered it fair. The morning of the 22nd Mr. Hughes instructed me by telephone to insist that LAC include passenger seats in the quoted airplane price. In reply to Hughes' direct question the evening of December 22, I stated I had talked to Schwartz about the seat price again, and that he had maintained his position. He then talked to Leonard Schwartz, who pointed out to Howard he was a little unhappy that this item should come up at this time, particularly in view of his earlier conversation with me on this subject. Leonard then advised Howard how Lockheed had determined that passenger seats were not part of the airplane price. The statements were essentially parallel with his earlier conversation with me, which I had relayed to Howard. Howard then talked to me again and stated that Leonard had explained how the price was arrived at, and he was satisfied.

I pointed out again, as I had done before on several occasions, including the morning of the 22nd, that the airplane specification, in my opinion, was not sufficiently complete to be suitable for use as a contractual instrument, and that I felt the most practical way to proceed in order to have the best possible negotiating position was to make the deal contingent upon resolution of specifications mutually agreeable to both parties by a date, such as March 1, or better yet, April 1, that being the estimated time required to do a reasonably complete job. I suggested the contract price could be tied to the specification as currently developed and made subject to additional reasonable costs or credits as specification resolution advanced. Mr. Hughes flatly rejected this proposal on the basis that he felt he must wind the deal up right away, and that he trusted Lockheed, that he believed Lockheed would do a good job, that he believed Lockheed would be fair because they knew that if they weren't we would not buy *additional* aircraft from them, that he felt I should be reasonable in my requests to Lockheed. I pointed out that what I was suggesting was exactly the form used in Contract LD-111 which resulted in a much better airplane for both TWA and Lockheed, and that the situation worked smoothly. He repeated that he felt he must conclude arrangements and that he thought Lockheed would do a good job and that the existing form of contract should be used.

[fol: 20999] I then pointed out to Mr. Hughes that in my opinion the airplanes would cost about three million dollars by the time they are delivered and that we were subject to high cost increases because of the pricing activities that Lockheed would indulge in as permitted by the proposed form of contract. Hughes stated that he had a verbal agreement with Bob Gross and Leonard Schwartz that Lockheed would not sell airplanes to others at a lesser price than to Hughes Tool, and that this agreement embraced the concept that if small quantities of airplanes were sold to other customers, that price differential in view of the relative quantities between such customers and Hughes Tool would be considered to exist in that appropriate price reductions from Lockheed would be considered part of his verbal agreement, and that for this reason he was not worried about the price.

I mentioned I felt the contract permitted unnecessary customer risk re CAA certification. He said with respect to CAA certification that he felt we should not raise this issue any further because Lockheed would do a good job in this regard.

I pointed out to Mr. Hughes that Lockheed intended to exclude the "Hell, No!" list of items, the accomplishment of which I felt was vital to building a successful airplane. Typical items included were lengthening the fuselage by a hundred and twenty inches to permit carrying additional payload, installation of four-wheel type main landing gears to permit use at otherwise restricted airports, further evaluation of structural characteristics in light of possible negative torque control failure, installation of power plant water injection, etc. Howard said he thought Lockheed would be willing to consider these items, and that they would be fair in their evaluation. He also stated that he felt Lockheed would cooperate fully. He asked that I contact him personally later on regarding any items that I felt Lockheed was being unreasonable on, and that he would handle these directly with Gross.

In closing the conversation with me, Howard again stated he trusted Lockheed and thought they would do a good job.

Following this conversation, papers were promptly executed by Lockheed and sent by special Hughes messenger to Houston to be available for the Hughes Tool Company Board Meeting today.

Mr. Hughes had negotiated a side letter agreement with Mr. Schwartz and Mr. Gross relating to the basic economy of the airplane. It stated in essence that the operating cost would have to be shown to be reduced by seven percent (7%) below the Lockheed estimated cost figure by March 1, or either party could cancel the contract.

/s/ R. W. RUMMEL
R. W. Rummel

RWR:JC

[fol. 21958]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 205

CHRONOLOGICAL LISTING OF FINANCING ARRANGEMENTS FROM 1/1/39 TO 6/30/61

4/11/39	Commercial National Bank unsecured loan 3% payable $100,000 10/1/39, $50,000 each six months thereafter	$ 300,000.00
4/30/40	Common stock offering 119,154 shares to Hughes Tool (DC-3 equipment)	1,659,000.00
11/ 1/40	Revolving credit agreement with Commercial National Bank and six other banks 2¾% due 12/31/44 prepaid on 10/31/42	2,250,000.00
8/ 1/45	Bank loan from group of banks secured by chattel mortgage on aircraft and equipment	1,700,000.00
11/30/45	Sinking Fund Debentures Ser. A 3—3¼% due 6/1/56	30,000,000.00
5/10/46	Sinking Fund Debentures Ser. B 2¼%—3¼% due 12/1/55	10,000,000.00
5/13/46	Equipment Mortgage Notes 2% due 10/8/51	1,238,663.00
1/31/47	Subordinated Convertible Notes 2¾% due 6/2/56	10,000,000.00
3/27/47	Equipment Mortgage Notes 2% due 5/27/52	2,815,480.00
3/25/48	Equipment Mortgage Notes 3% due 5/31/53	17,945,423.00

2/ 1/49	Conditional Sale Contract 3% due 12/1/53	1,062,000.00
2/ 6/49	Common stock offering 404,112 shares issued	3,838,756.00
8/ 4/49	Equipment Mortgage Notes 3% due 4/30/55	12,000,000.00

[fol. 21959]

5/ 1/50	Equipment Mortgage Notes Ser. A 3% due 5/31/56	$ 12,846,624.00
6/ 1/50	Conditional Sale Contract 2½% due 5/1/55	3,111,257.00
1/15/51	Equipment Mortgage Notes 3¾% due 7/31/56	9,244,885.00
3/ 2/51	Conditional Sale Contract 3% due 5/1/56	2,771,331.00
1/30/52	Common stock offering 240,774 shares issued	5,000,019.00
7/22/52	Equipment Mortgage Notes Ser. B 3¾% due 5/31/56	425,000.00
7/22 52	Equipment Mortgage Notes Ser. C 3¾% due 7/31/55	3,060,000.00
10/30/52	Common stock offering 353,822 shares issued	5,582,050.00
4/ 1/54	Conditional Sale Contract 3¾% due 5/1/59	3,150,000.00
12/20/54	Revolving Credit Agreement Banks 3% due 6/30/57 (repaid 1/31/55)	2,000,000.00
12/30/54	Equipment Mortgage Sinking Fund Bonds 3¾% due 12/1/69	40,000,000.00
2/28/56	Revolving Credit Agreement Banks 3% due 6/30/57	4,500,000.00

6/ 6/56	Conditional Sale Contract Hughes Tool Co. 3¾% due 8/1/61 (prepaid on 6/18/57).	18,739,640.00
6/17/57	Sale of common stock 3,337,036 shares	43,188,978.00

[fol. 21960]

6/18/57	Borrowed from banks during June and July under loan agreement dated 5/15/57 ($10,000,000 paid 12/2/57, $25,000,000 payable in 36 monthly installments beginning 1/1/58, prepaid balance owing 5/19/60 of $3,309,091.92)	$ 35,000,000.00
12/ 2/57	Borrowed from Hughes Tool under terms agreement dated 6/7/57	5,811,000.00
12/31/57	Borrowed from banks on 90 day unsecured 5¼% notes	12,000,000.00
12/31/57	Conditional sales contract Lockheed Aircraft Corp. for 4—1649A aircraft. Unpaid portion due in 19 quarterly installments beginning 7/1/58 4½%	7,293,199.00
4/23/58	Conditional sales contracts dated in April and May 1958 payable in quarterly installments beginning 8/15/58	6,476,437.24
7/ 1/58	Bank loan dated 12/31/57 5¼% purchased by Hughes Tool Co.	12,000,000.00
12/30/60	Borrowed from banks under Loan Agreement dated 12/1/60 6% Equipment Mortgage Serial Notes due 12/31/61 and quarterly until 9/30/64 ($6,000,000 of total borrowed 2/2/61)	72,200,000.00

12/30/60	Borrowed from insurance companies under Note Purchase Agreement dated 12/1/60 6½% Equipment Mortgage Sinking Fund notes due 12/31/72 ($30,000,000 borrowed in 1961)	92,800,000.00
12/30/60	Interim Subordinated Note to Hughes Tool 6½% due 6/30/73	100,000,000.00
6/13/61	Issued 6½% Subordinated Debentures due 6/1/78 to Hughes in part payment of Interim notes. (balance in cash)	80,962,100.00
6/30/61	Issued 6½% Subordinated Debentures due 6/1/78	19,037,900.00

[fol. 22010]

In the United States District Court
Southern District of New York

Defendants' Exhibit No. 217

The Equitable Life Assurance Society
of the United States

Securities Investment Department

For Mr. C. W. Dow Dated at New York June 8, 1949

Subject Transcontinental & Western Air, Inc.

The Company, through Ralph Damon, President and A. V. Leslie, Treasurer, recently submitted for our consideration and approval a proposal for the acquisition and financing of additional Constellation aircraft. The principal points of this proposal may be summarized as follows:

Aircraft to be acquired: 20 Model 749 Constellations, of which the first seven delivered would be added to the International Division, increasing the present fleet of 12 Constellations to 19 by September 1950 and permitting the disposal of the present 10 passenger DC-4s; the next 13 delivered would be added to the Transcontinental Division. The latter addition would permit the disposal of 5 Boeing Stratoliners and 39 DC-3s; the Transcontinental fleet would then consist of 36 Constellations, 23 passenger DC-3s and 8 cargo DC-3s.

Delivery of aircraft: March 1950 to January 1951.

Cost of aircraft: $925,000 per airplane, an aggregate of $18,500,000, plus $500,000 for spare parts, or a total expenditure of $19,000,000.

Method of payment: 25% ($4,750,000) in cash in four installments in June, September and December 1949 and March 1950; the balance of $14,250,000 to be financed through a 3% equipment obligation to be taken down as each airplane is delivered and to be repaid immediately following delivery of last plane (January 1, 1951) by 57 equal monthly payments of $250,000.

Terms of financing: The following terms have been suggested as the result of discussions with the Mellon Bank of Pittsburgh, which would head up the financing:

(a) $15,000,000 3% Five Year Notes secured by a first mortgage on the proposed 20 new aircraft and by a second mortgage on the Constellations presently subject to the first lien of the outstanding 3% Notes. To be issued as airplanes are delivered.

(b) Participants:

Mellon	$3,000,000
Bankers Trust	3,000,000
J. P. Morgan	1,500,000

1st Nat. of Boston	2,250,000
N.Y. Trust	2,250,000
Bank of America	1,500,000
Security 1st Nat.	750,000
California Bank	750,000

[fol. 22011]

(c) Commitment to be reduced by an amount (not in excess of $1,000,000) equal to the excess of general cash funds over $16,000,000, as of the end of each of the four quarters of the first year of commitment.

(d) Commitment fee of 1% to be paid.

(e) Quarterly, following issuance of all Notes, there shall be prepaid an amount of Notes equal to the excess of general cash funds over $16,000,000, but such prepayment shall not exceed $1,000,000 quarterly.

(f) Restrictions on creation of additional debt and purchase of aircraft to be provided.

(g) Proposed Notes to be guaranteed by Lockheed Aircraft to the extent of $10,000,000 less the amount of Lockheed's guaranty of the present 3% Notes (this latter guaranty is in excess of $10,000,000).

Guaranty of Net Worth: Hughes Tool Company to guaranty that TWA's net worth would increase by $10,000,000 in the nine month period ended Dec. 31, 1949.

After discussion of the above proposal with Mr. Parkinson and Mr. Shailer, Mr. Dow advised the Company that the Society would consider approval of the proposal provided that $2,500,000 Debenture 3s due 1956 would be redeemed concurrently with issuance of the proposed 3% Notes. He also indicated that the Society would consider participation in the proposed financing to the extent of $5,000,000.

Subsequently, the Company notified Mr. Dow that the proposed redemption of Debenture 3s would not be acceptable to the Mellon which would prefer to have the bank group take the entire amount of the financing.

Today, in a meeting with Mr. Leslie, Mr. Dow stated that the Society would consider favorably the original financing proposal on the following basis:

1. No contingent prepayment of proposed 3% Notes based on amount of general cash funds. (However, reduction of the commitment on such a basis would be acceptable.)

2. Lien of proposed 3% Notes to be confined to new aircraft to be acquired.

3. No restrictions to be included in terms of proposed 3% Notes relating to creation of debt, purchase of aircraft, or other matters not relating directly to the [fol. 22012] proposed financing.

4. Equitable to have the right to purchase at any time all the proposed 3% Notes.

5. Equitable to have the right to obtain a first lien on all flight equipment following repayment of all existing and presently proposed equipment obligations.

Mr. Leslie discussed the above proposal with the Mellon and advised us that the bank would not alter its firm position on the terms as originally suggested.

/s/ Arthur Gilbart
Arthur Gilbart

[fol. 22013]

FILE COPY

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 218

Industrial No. B

June 28, 1949

Transcontinental & Western Air, Inc.
S. F. Debenture 3s, 1956, "A"
S. F. Debenture 3s, 1955, "B"

Securities Invest. Dept.

The Society presently has an investment of $37,917,000 in this Company, consisting of $28,437,000 Debenture 3s due June 1, 1956 and $9,480,000 Debenture 3s due December 1, 1955. The Debentures were purchased privately in 1945 and 1946 ($40,000,000 in total); to date $2,000,000 have been retired through sinking fund payments and $83,000 through use of insurance proceeds.

The Company proposes to purchase 20 additional Lockheed Model 749 Constellation aircraft (at a price of $925,000 each) at a cost of $18,500,000, and to purchase also about $1,500,000 of spare parts—the total cost of the planes and parts being about $20,000,000. The proposed equipment program would be financed as follows:

3% Secured Notes	$12,000,000
Company funds	8,000,000
Total cost	$20,000,000

The 3% Secured Notes are to be purchased by a group of eight banks, headed by the Mellon National Bank & Trust Company and Bankers Trust Company. The principal features of the 3% Notes are to be as follows:

To be issued: On or before March 31, 1951.

Repayment:	50 equal monthly installments commencing March 31, 1951.
Security:	To be secured by a chattel mortgage covering the 20 new Constellations and spare parts. To be further secured by a second mortgage on 12 Model 749 Constellations and 8 Model 49 Constellations, which equipment is covered by a chattel mortgage ($15,585,000 outstanding at March 31, 1949) originally issued to the amount of $17,945,000 in 1948.
General:	The banks are to have the right of first refusal of any additional debt financing proposed by the Company.

The $8,000,000 of Company funds to be used will be payable as follows:

$1,000,000	on signing of contract
1,000,000	on August 1, 1949
1,000,000	on October 1, 1949
1,000,000	on December 1, 1949
625,000	on February 1, 1950
3,375,000	from time to time as the new equipment is delivered.
$8,000,000	

The Company expects to take delivery of the 20 new Constellations in accordance with the following schedule:

March,	1950—1	September,	1950—3
April	" —1	October	" —3
May	" —1	November	" —3
June	" —1	December	" —3
July	" —1	January	" —2
August	" —1		
		Total	20

[fol. 22014] The present position of the Company as to number and types of aircraft is shown below, together with the changes presently contemplated after acquisition of 20 new Constellations:

Transcontinental Division	Present Fleet	Proposed Fleet End of 1950	Proposed Fleet End of 1951
Constellation Model 49	23	23	23
" Model 749	—	11	13
Boeing Stratoliner	5	—	—
Douglas DC-3	70	37	31
International Division			
Constellation Model 749	12	19	19
Douglas DC-4	12	12	2
Douglas DC-3	1	1	1

The Company estimates that the proposed acquisition of 20 new Constellations should increase its earnings for 1950 by $5,183,000 and its operating cash by $5,755,000. For 1951 it is estimated that earnings will be increased by $4,962,000 and cash by $5,265,000.

The Indenture securing the Debenture 3s held by the Society includes covenants which prevent the creation of additional funded debt and prevent the acquisition of additional aircraft unless net working capital exceeds $20,000,000 (at April 30, 1949 net working capital was $15,109,000).

Authority is requested to consent to the execution of a supplemental indenture which will permit the Company:

(1) To issue the proposed $12,000,000 of 3% Notes and to secure them by chattel mortgage and second mortgage as indicated above.

and (2) To purchase 20 additional Lockheed Model 749 Constellation aircraft and spare parts at a cost of not exceeding $20,000,000.

provided that:

(1) The Society is given the right to purchase (at par and accrued interest) the presently proposed se-

cured 3% Notes at any time that it also purchases the secured 3% Notes which were issued in 1948.

and (2) The Company obligates itself to secure the Debenture 3s by mortgage on its presently owned Constellation fleet and the proposed 20 new Constellations as soon as the secured bank indebtedness is paid off.

[fol. 22095]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 226

TWA
TRANS WORLD AIRLINE
U.S.A. Europe Africa Asia

TRANSCONTINENTAL & WESTERN AIR, INC.
Cable Address "TWAIR"
Kansas City 6, Missouri

January 17, 1950

Mr. Charles Dow
Second Vice President
Equitable Life Assurance Society of the U. S.
393 Seventh Avenue
New York, New York

Dear Chuck:

Attached is a revised letter requesting your approval of our proposed Constellation purchase on the new basis discussed over the phone Monday.

By the time you receive this, you will have read the request for waivers sent to the banks, which clarify the proposed transaction in somewhat more detail.

The proposed method is certainly much more attractive to TWA than open market financing, longer terms, sixty months, greater percentage carried by the seller initially, 80% of cost, lower interest rate, probably 2⅜% and, most importantly from my view, the form, conditional sales contract, not involving our general credit.

Kindest regards,

/s/ Vic

A. V. Leslie
Vice President & Treasurer

[Stamp—Chas W. Dow—2nd Vice President—Jan 19 1950]

[fol. 22096]

TWA
Trans World Airline
U.S.A. Europe Africa Asia

Transcontinental & Western Air, Inc.
Cable Address "TWAIR"
Kansas City 6, Missouri

January 17, 1950

Equitable Life Assurance Society of the U. S.
393 Seventh Avenue
New York, New York

Attn: Mr. Charles W. Dow
Second Vice President

Gentlemen:

This is to request your waiver, to the extent necessary, of the applicable restrictions contained in the Indenture dated as of December 1, 1945, between Transcontinental & Western Air, Inc., and The Commercial National Bank & Trust Company of New York, as amended by Supplemental Indentures dated respectively June 1, 1946, January 15, 1947, March 15, 1948, February 1, 1949, and August 1, 1949 (hereinafter collectively referred to as "The Indenture"), so as to permit our acquisition of not to exceed six Model 049 Lockheed Constellation used aircraft, and the appropriate modification thereof prior or subsequent to such acquisition by ourselves or others, under conditional sale arrangements, all as more definitively described in letters of even date to the Mellon National Bank and Trust Company, Agent, copies of which are enclosed herewith.

Your early attention to this matter would be greatly appreciated.

Yours very truly,

TRANSCONTINENTAL & WESTERN AIR, INC.

/s/ A. V. LESLIE

By: A. V. Leslie
Vice President & Treasurer.

[Stamp—Chas W Dow—2nd Vice President—Jan 19, 1950]

[fol. 22097]

COPY

TRANSCONTINENTAL & WESTERN AIR, INC.

101 W. 11th St.
Kansas City, Missouri

January 17, 1950

Mellon National Bank & Trust Company, Agent
514 Smithfield Street
Pittsburgh 6, Pennsylvania

Attention: Mr. Ralph S. Euler
Executive Vice President

Gentlemen:

Reference is made to our notice letter to you dated January 9, 1950, pursuant to that certain "Credit Agreement" and "Chattel Mortgage" therein specified, setting forth a proposal to acquire five used Model 049 Lockheed Constellation aircraft, and the borrowing to finance such acquisition, to be evidenced by promissory note(s) payable in fifty-five consecutive monthly installments with interest at 3% per annum, secured by chattel Mortgage.

The basis on which used Model 049 Constellation aircraft are now available for acquisition by us has so substantially changed from the proposals indicated in our notice letter of January 9, 1950 that we must now suggest the following:

1. That the notice letter of January 9, 1950 be given no further consideration, since arrangements on the basis therein proposed are no longer under consideration by us.
2. That the enclosed notice letter of even date, concerning our acquisition of not to exceed six Model 049 Lockheed Constellation aircraft under Conditional Sale arrangements, be viewed as our present program.

Our immediate program depends upon our acceptance of arrangements for acquiring from the Hughes Tool Company the six aircraft on the Conditional Sale basis outlined in the enclosed notice letter. We plan to meet the payments and other costs which this program involves out of our general funds, and have no present plans or desires to effect additional borrowing for this purpose.

Since quick physical possession of at least four of the aircraft, as soon as Air France has delivered them to the Hughes Tool Company, is of primary importance to us, and the available Conditional Sale basis outlined in the enclosed notice letter is deemed advantageous to us, it would be in our interest to obtain relief from the running of the thirty-day period (twenty days followed by ten [fol. 22098] additional days) provided by the sections of the Credit Agreement and Chattel Mortgage referred to in the first paragraph of the enclosed notice letter.

Accordingly, we hereby make request of the Lending Banks for appropriate waiver under said Credit Agreement and Chattel Mortgage of the applicable provisions and restrictions thereof so as to permit our immediately concluding conditional sale arrangements with the Hughes Tool Company for our acquisition of not to exceed six used Model 049 Lockheed Constellation aircraft, as more definitively described in the enclosed notice letter to you of even date.

Your early attention to this matter will be greatly appreciated, and to assist you in disseminating the current notice enclosed and the waiver request embodied herein, we enclose fifteen copies of this letter and the notice letter of even date to which this letter refers.

Very truly yours,

TRANSCONTINENTAL & WESTERN AIR, INC.

By /s/ A. V. LESLIE
Vice President & Treasurer

THE WAIVER REQUESTED ABOVE
IS HEREBY GRANTED:

....

By ....

[fol. 22099]

TRANSCONTINENTAL & WESTERN AIR, INC.

January 17, 1950

Mellon National Bank & Trust Company, Agent
514 Smithfield Street
Pittsburgh 6, Pennsylvania

Attention: Mr. Ralph S. Euler
Executive Vice President

Gentlemen:

This is written notice, pursuant to Section 4.05 of that certain "Credit Agreement" dated as of August 4, 1949, by and among Mellon National Bank and Trust Company, as

Agent, the banks named in Section 2.01 thereof, Transcontinental & Western Air, Inc., and Lockheed Aircraft Corporation, and pursuant to Section 2.14 (g) (18) of the Chattel Mortgage dated as of August 4, 1949, from Transcontinental & Western Air, Inc., to Mellon National Bank and Trust Company, as Trustee, of the proposed acquisition by Transcontinental & Western Air, Inc., of aircraft and related equipment and kits on substantially the following basis:

1. It is proposed to acquire from the Hughes Tool Company not to exceed six used Model 049 Lockheed Constellation aircraft which have been operated respectively by Air France and KLM.

2. It is proposed that the acquisition of these aircraft will be at a base price averaging approximately $625,000 each, as to four aircraft, and at a base price averaging approximately $626,500 each, as to two aircraft, aggregating approximately $3,753,000 for the six aircraft. The average base prices above stated do not include any cost of modification, which may be effected before or after acquisition and in whole or in part by TWA or others, and the price of particular aircraft may be subject to certain factors of adjustment due to engine time, condition, etc.

3. It is proposed to acquire these aircraft through conditional sale arrangements, pursuant to which we as conditional buyer will make a downpayment of ap- [fol. 22100] proximately $100,000 with respect to each aircraft at the time each aircraft is delivered to us, followed by monthly installment payments of approximately one-sixtieth of the remaining unpaid balance, plus interest on the remaining unpaid balance at a rate not exceeding two and one-half per cent per annum; with the conditional seller limited as to remedy, in event of our default in any such payment, to repossession of the aircraft.

This letter constitutes and is intended to constitute the notice contemplated by the instruments referred to in the first paragraph hereof.

Very truly yours,

Transcontinental & Western Air, Inc.

By /s/ A. V. Leslie
Vice President and Treasurer

[Stamp—Chas W. Dow—2nd Vice President—Jan 19 1950]

[fol. 22111]

In the United States District Court
Southern District of New York

Defendants' Exhibit No. 228

[Handwritten notation—Bank Credit Agreement]

FILE COPY

Industrial
April 4, 1950

Securities Invest. Dept.

Transcontinental & Western Air, Inc.
S. F. Debenture 3s due 1955
S. F. Debenture 3s due 1956

The Society's present investment in TWA totals $36,917,000, consisting of $8,480,000 and $28,437,000 principal amount of the above Debenture 3s due 1955 and Debenture 3s due 1956, respectively, the balance of two issues aggregating $40,000,000 which were purchased privately in 1945 and 1946. The Company proposes to purchase 30 Martin 404 twin-engined 40-passenger airplanes from the Glenn L. Martin Co., as replacements for a major part of the 64 DC-3 aircraft which it now operates on certain domestic routes. Total cost of the Martin aircraft, including spare parts, will be approximately $16,500,000 and will be financed to the extent of 40% by use of the Company's cash funds and to the extent of 60% by borrowings from a group of banks headed by the Mellon National Bank and Trust Co. It is contemplated that these borrowings will be made under a stand-by credit of $10,000,000 for the period from May 1, 1950 to November 1, 1951, with a provision that at the end of this period, all loans theretofore made will be converted into a term loan which will mature in equal monthly amounts over a period of 50 months. The lending banks will have the right at any time to take one or more Chattel mortgages on any or all of the Martin aircraft and spare parts to be acquired. A commitment fee of ¾ of 1% will be paid on the unused portion of the stand-by credit, and interest at the rate of 3% will be paid on all funds borrowed. The Indenture, as amended, pursuant to which the Debentures were issued does not permit the Company: (i) to create additional indebtedness of the type contemplated; (ii) nor to acquire aircraft unless net working capital shall be at least $20,000,000 (net working capital at February 28, 1950 was $15,989,000).

Deliveries of the Martin 404 airplanes are expected to begin in the early part of 1951 and to be completed prior to November 1, 1951. Eastern Air Lines has recently ordered 35 similar aircraft which will be delivered simultaneously. TWA has leased from the Glenn L. Martin Co., 12 Martin 202 airplanes (an earlier model of the 404) which will be delivered in July of this year and subsequent months. These airplanes will be returned to Martin toward the latter part of the 404 delivery period.

The Company's present fleet and proposed additions are shown in the following table:

	Lockheed	Martin		Douglas		Boeing
	Constellation	202	404	DC-3	DC-4	Stratoliner
Now Owned	35			64	14*	5
To be lesaed		12				
To be acquired	26**		30			

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* Including 2 leased.

** Consisting of 6 to be acquired at a total cost of approximately $3,750,000 from Hughes Tool Company under a conditional sales contract and 20 to be acquired from Lockheed at a total cost of approximately $20,000,000 to be provided by $8,000,000 of Company funds and by issuance to a group of banks of $12,000,000 3% Notes (1949).

It is contemplated that as additional aircraft are acquired a major part of the DC-3s, all of the Boeing Stratoliners and some the DC-4s will be sold or otherwise disposed of depending on the Company's equipment requirements.

The effect on the Company's funded debt of the financing contemplated in the acquisition of the 30 Martin 404 airplanes and of the 26 Constellation airplanes referred to above may be demonstrated as follows:

[fol. 22112]

Funded Debt Outstanding

	Dec. 31, 1949	Dec. 31, 1950*	June 30, 1951*
2% Notes due 1950	$ 108,000		
3% Notes due 1950-1953	12,225,000	$ 8,647,000	$ 6,855,000
Proposed 3% Notes (1949)	—	12,000,000	11,040,000
Proposed 3% Notes (1950)	—	—	10,000,000
Conditional Sales Contract (1949)	882,000	666,000	558,000
Proposed Conditional Sales Contract	—	3,375,000	3,000,000
Total	13,215,000	24,688,000	31,453,000
Debenture 3s due 1955	8,480,000	7,480,000	7,480,000
Debenture 3s due 1956	28,437,000	26,437,000	24,437,000
Total	36,917,000	33,917,000	31,917,000
Total Funded Debt	$50,132,000	$58,605,000	$63,370,000

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* Pro forma based on certain assumptions as to creation and repayment of additional funded debt.

In connection with the acquisition of the Martin 404 aircraft and the creation of additional funded debt by TWA, the Hughes Tool Company, owner of approximately 74% of the Company's capital stock, will agree to purchase from TWA prior to December 31, 1951 sufficient shares of TWA capital stock so that the net proceeds shall be at least $5,000,000; however, the Hughes Tool Company will be released from such obligation if TWA sells to others sufficient shares of its stock to net proceeds of a like amount. Hughes Tool Company will also agree to lend TWA $5,000,000 on a subordinated basis if for any reason it is impossible for TWA to issue the required number of shares of capital stock.

Authority is requested to consent to the execution of a Supplemental Indenture which will permit Transcontinental & Western Air, Inc.:

1. To acquire 30 Martin 404 aircraft and spare parts at an aggregate cost not in excess of $17,000,000; and
2. To create in connection with the foregoing acquisition secured indebtedness not in excess of $10,000,000, with a total term not longer than six years, bearing an interest rate not in excess of 3% and having a lien only on the 30 Martin 404 aircraft and spare parts to be acquired;

Provided, however, that the Hughes Tool Company will agree: (i) to purchase or cause TWA to sell to others sufficient shares of TWA capital stock so that the net proceeds shall be at least $5,000,000; and (ii), in the event that for any reason it is impossible for TWA to issue the required number of shares of capital stock, to lend TWA $5,000,000 on a subordinated basis.

[fol. 22113]

Financial Data

Years Ended Dec. 31	Operating Revenues	Net Income	Depreciation & Amortization
1946	$ 59,588,000	$(12,126,000)	$ 5,791,000
1947	82,339,000	(4,581,000)	7,812,000
1948	101,114,000	(1,278,000)	9,647,000
1949	105,985,000	3,708,000	9,992,000

Note: Above data have been adjusted for all retroactive mail payments received to date but not for possible repayment of approximately $1,800,000 of international mail pay alleged by CAB to be excessive during 1949.

Balance Sheet Comparison

	Dec. 31, 1947	Dec. 31, 1949	Change
Current Assets			
Cash & Equivalent	$ 8,775,000	$18,064,000	$ 9,289,000
Receivables	9,451,000	11,097,000	1,646,000
Inventories	1,767,000	1,359,000	(408,000)
Total Current Assets	19,993,000	30,520,000	10,527,000
Current Liabilities			
Funded Debt due Currently	1,913,000	7,182,000	5,269,000
Other	10,602,000	7,257,000	(3,345,000)
Total Current Liabilities	12,515,000	14,439,000	1,924,000
Net Working Capital	7,478,000	16,081,000	8,603,000
Net Property*	39,240,000	38,068,000	(1,172,000)
Special Funds for Aircraft Purchase	—	8,000,000	8,000,000
Total	46,718,000	62,149,000	15,431,000
Less: Unearned Income	3,310,000	3,011,000	(299,000)
Net Tangible Assets	$43,408,000	$59,138,000	$15,730,000
Funded Debt (Less Amt. due Currently)	$42,638,000	$43,342,000	$ 704,000
Net Tangible Assets as % of Funded Debt	101.6%	136.5%	

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* Number of Constellation aircraft owned: December 31, 1947, 22; Dec. 31, 1949, 35.

[Stamp—File Copy Securities Invest. Dept.]

[fol. 22622]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 269

[Handwritten notations—File—Credit Agreement Modification]

Industrial No. A

June 3, 1952

Trans World Airlines, Inc.

S. F. Debenture 3¼s, 1956, "A"
S. F. Debenture 3¼s, 1955, "B"

The Society owns $28,917,000 principal amount of this Company's 3¼s S. F. Debenture bonds, the balance of $40,000,000 in two series purchased privately at par in 1945 and 1946.

Trans World Airlines now has outstanding a Credit Agreement with a group of banks dated May 1, 1950 providing for a standby credit in the maximum amount of $12,850,000 to finance 60% of the purchase price of 40 Martin 404 aircraft and related parts, the estimated contract purchase price of which is $21,687,000. The Notes are secured by a Chattel Mortgage on the aircraft. The Society previously amended and waived provisions of the Indenture relating to these Debentures to permit the acquisition of the aircraft and to permit the Company to incur the Credit Agreement with notes to be due monthly from May 31, 1952 through April 1, 1956. At present 12 of the aircraft have been delivered and $3,484,000 of the Notes issued to banks.

Recently, as part of the general refinancing program of the Glenn L. Martin Company, the airlines purchasing the Martin 404 aircraft (including TWA) agreed to an increase of $25,000 in the price of each. For TWA this amounts to $1,000,000.

In addition TWA recently contracted, with permission of the Society, to purchase 12 Martin 202A aircraft from the Glenn L. Martin Co. at a price of $425,000 each, or an aggregate of $5,100,000.

To finance part of the above $6,100,000 expenditures for aircraft the Company has asked the Society to approve an amendment of the Indenture to permit the 1950 Credit Agreement indebtedness to be increased from a maximum of $12,850,000 to $16,335,000, an increase of $3,485,000 and to extend the chattel mortgage to cover the additional 12 Martin 202A aircraft. The increase will be applied as follows:

$3,060,000	for 60% of $5,100,000 cost of 12 Martin 202A aircraft.
425,000	to cover part of the increase in cost of the 40 Martin 404 aircraft.
3,485	

The present bank notes carry a maximum interest of 3%. Interest payable on the increased amount of $3,485,000 will be 3¾%. The monthly payments on the notes will be extended by three months to June 30, 1956.

Authority is requested to amend the Indenture so as to permit the Company to amend its 1950 Credit Agreement to increase the amount from $12,850,000 to $16,335,000, to extend the chattel mortgage to the 12 Martin 202A aircraft, to pay a maximum interest of 3¾% per annum on the $3,485,000 increased amount, and to extend the monthly maturities by three months to June 30, 1956.

Trans World Airlines also has requested that the Society permit the Company to lend $100,000 to its wholly owned subsidiary, New Mexico Airport Corporation. The Indenture limits the amount of investments of this nature the Company may make to $250,000 after August 1, 1949. As this maximum has already been used for other situations, the Company has asked for a waiver to permit the proposed loan.

[fol. 22623] About twenty years ago TWA established this subsidiary to build the airport terminal building at Albuquerque, N. M. to help the municipality develop its airport facilities. The subsidiary's operations have been profitable as a result of very favorable income from rent to concessionaires. New Mexico Airport Corp. now contemplates the construction of a new Air Mail Field Post Office building (to be leased to the U. S. Gov't) and an addition to the Terminal Building at an aggregate cost of $100,000. The project will be financed by the loan from TWA bearing interest of 4%.

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* Italics indicate handwritten matter.

Authority is requested to permit the Company to loan $100,000 to its wholly-owned subsidiary, New Mexico Airport Corporation.

As consideration for the above changes, Trans World Airlines will pay the Society a fee of $75,000.

[Stamp—File Copy—[illegible]curities Invest. Dept.]

[fol. 23069]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 311

(Letterhead of Trans World Airlines, Inc., N. Y., N. Y.)

December 19, 1955

Dear Noah:

You have requested my views as to what TWA's near-term financial abilities may be, having regard to the options which it intends to execute taking over airplanes now under firm order by the Hughes Tool Company and against which the latter has made interim payments required by the manufacturer.

You have also requested my comment on TWA's abilities to contract for equipment of more advanced characteristics such as have been ordered by other major air lines with which we compete.

Existing equipment commitments which we propose to take over from the Hughes Tool Company are, in round figures, as follows:

	(Millions)
8 1049G Constellations	$15.2
Company Furnished Equipment	1.0
(Delivery dates June-September 1956)	$16.2
25 1649 Constellations	$58.0
Equipment Spares	11.0
Company Furnished Equipment	3.0
(Delivery dates April-September 1957)	$72.0
Grand Total	$88.2

There may be escalation involved and it is possible, and for planning purposes should be assumed, that the total program aggregates 90 million.

Facts and premises which are pertinent in making a forward estimate are (in millions):

[Handwritten notation—Copy to C. Davis—5-24-61]
[fol. 23070]

1. On April 1, 1956 (the beginning of our next budget period), working cash will be $12.0
2. Debt on that date will be 40.0
3. Net worth will be 73.0
4. Net income in terms of Gross Revenues will aggregate the level presently projected for the 12 months ended September 30, 1956 2.50%
5. That equipment requirements can be funded as to 60% by secured notes running off in 5 years (a pattern for which we have precedence in the past).
6. That at any given time TWA requires working cash equal to three weeks cash operating expenses.

(Millions)

	3/1/56	12/31/57	12/31/58
Beginning Cash	$12.0	$ 9.2	$ 3.5
Increase Factors			
Net Income	*$ 8.0 (9 mo.)	$ 7.0	$ 7.8
Depreciation	18.7 (9 mo.)	36.0	35.0
Borrowings—60% of A/C CFE and Spares	9.7	43.2	
	$36.4	$86.2	$42.8
Cash Requirements			
Property & Equipment ex A/C	$23.0	$13.0	$13.0
Flight Equipment	16.2	72.0	
Debt Repayment			
Equitable		5.0	5.0
8 1049G's		1.9	1.9
25 1649's			8.6
	$39.2	$91.9	$28.5
Cash Gain	($ 2.8)	($ 5.7)	$14.3
	12/31/56	1/1/57	1/1/58
Ending Cash	$ 9.2	$ 3,5	$17.8
Working Cash Deficiency	1.5	13.2	0.6 excess

*Assumed $3.0 net loss 1st quarter of year.

[fol. 23071] Review of the preceding table indicates that the cash building ability of the company is such that it will be unable to carry the presently committed program with normal borrowings. This is so since, during a full two-year period, it will be deficient in its working cash balance to a maximum sum of $13.2 million under minimum requirements, this occurring about the end of 1957.

It is evident that TWA can handle the purchase of the eight 1049G's without difficulty, given 60% funding of the purchase price.

As to the 1649's, the Tool Company has made a payment to the manufacturer of 25% of the roundly $58 million cost of the 25 planes (ex spares and company furnished equipment), a sum of approximately $17 million.

Should the Tool Company be willing to continue to finance this purchase by TWA to the extent of this payment on a subordinated basis, it appears that TWA could finance the remaining portion through 60% funding plus cash generation. I would expect that arrangements could be made with the loaning agency which would allow us to pay the Tool Company against this receivable during the life of the borrowing to the extent that general fund cash exceeded reasonable working requirements. A forecast of cash on the foregoing basis is shown:

(Millions)

	3/1/56	12/31/57	12/31/58
Beginning Cash	$12.0	$ 9.2	$10.3
Increase Factors			
Net Income	$ 8.0 (9 mo.)	$ 7.0	$ 7.8
Depreciation	18.7 (9 mo.)	36.0	35.0
Borrowings 60% of A/C CFE & spares	9.7	33.0	
HTCo subordinate note		17.0	
	$36.4	$93.0	$42.8
Cash Requirements			
Property & equipment ex A/C	$23.0	$13.0	$13.0
Flight Equipment	16.2	72.0	
Debt Repayment			
Equitable		5.0	5.0
8 1049G's		1.9	1.9
25 1649's			6.6
	$39.2	$91.9	$26.5
Cash Gain	($ 2.8)	$ 1.1	$16.3

	3/1/56	12/31/57	12/31/58
Ending Cash	$ 9.2	$10.3	$26.6
Deficiency in Cash	1.5	6.4	9.4 excess

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* Assumed $3.0 net loss 1st quarter of year

[fol. 23072] I believe the cash position indicated by the table would allow us to deal successfully with a financing agency for the amounts indicated and further give us hope that payment in some measure might be made to the Tool Company although this would be dependent upon a continuously profitable operation through 1958.

To your final question, the ability to finance additional equipment, we know that the manufacturer would require a down payment in the order of 25% and progress payments totaling at least another 25% during the succeeding 18 months from the signing of the contract.

However modest TWA's views might be, the figures indicate it could not, even with Tool Company assistance to the extent indicated in preceding paragraphs, generate any excess cash until 1959 if we assume payment of the Tool Company note during 1958 (which is optimistic). Without laboring the point, I can only say, if TWA is to have additional aircraft requiring near-term cash, the Tool Company must accept the burden for a period extending at least beyond 1958.

Kindest personal regards.

/s/ Vic
A. V. Leslie

Mr. Noah Dietrich
Hughes Tool Company
7000 Romaine Street
Hollywood 38, California

[fol. 23628]

In the United States District Court

Southern District of New York

Defendants' Exhibit No. 329

MINUTES OF THE BOARD OF DIRECTORS MEETING
TRANS WORLD AIRLINES, INC.

June 26, 1959

The regular meeting of the Board of Directors of Trans World Airlines, Inc. was held on Friday, June 26, 1959, at 9:30 a.m., at the offices of the Corporation, 380 Madison Avenue, New York, New York.

Directors present were: Messrs. Fred W. Ayers
E. O. Cocke
Raymond A. Cook
A. V. Leslie
Sidney Maestre
Warren Lee Pierson
C. H. Price
Ben-Fleming Sessel
A. D. Simpson
T. A. Slack
Charles S. Thomas
Milton H. West, Jr.

constituting a quorum.

Directors absent were: Messrs. Palmer Bradley
John A. Collings
Oscar Holcombe
M. E. Montrose
H. E. Rogers
Loyd Wright (entered meeting later)

Mr. Carl S. Rowe of Counsel was present by invitation.

Mr. Warren Lee Pierson, Chairman of the Board, called the meeting to order and thereafter presided.

The Secretary of the Corporation, Mr. Ronald Duckworth, acted as Secretary of the meeting.

* * * * * * *

[fol. 23633]

CONSENT TO SALE OF SIX BOEING MODEL 707 AIRCRAFT BY HUGHES TOOL COMPANY

The President referred to the eighteen Boeing Model 707-331 aircraft on order by Hughes Tool Company under contracts assignable to the Corporation. He advised the meeting that he had been informed by Hughes Tool Company of its proposal to assign its rights to six of such aircraft to Pan American World Airways, subject to the approval of Boeing Airplane Company. The President stated that he had advised Hughes Tool Company that the Corporation had no objection to and consented to such assignment.

After discussion, upon motion duly made and seconded, the following resolution was unanimously adopted (Messrs. Ayers, Price and Slack not voting):

> RESOLVED, that the action of the President in consenting to the assignment by Hughes Tool Company of its rights to six of the eighteen Boeing Model 707-331 aircraft on order by Hughes Tool Company under contracts assignable to this Corporation be, and it hereby is, ratified, confirmed and approved.

[fol. 23634]

DATE AND PLACE OF NEXT BOARD MEETING

It was the consensus of the meeting that the regular meeting of the Board of Directors scheduled to be held on July 30, 1959, should be cancelled and that the regular meeting scheduled to be held on August 27, 1959, should be held at 9:30 a. m. at the offices of the Corporation, 380 Madison Avenue, New York, New York.

ADJOURNMENT

There being no further business to come before the meeting, it was adjourned at 11:55 a. m.

/s/ RONALD DUCKWORTH
Ronald Duckworth
Secretary

[fol. 23777]

[Handwritten notations—File—Trans World Airlines]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 340

Mr. A. George Jensen, February 9, 1956
Manager

TWA $400 Million Equipment Program

TWA currently has funded indebtedness for capital assets previously purchased amounting to $40 million owed to the Equitable (giving effect to final $5,000,000 takedown on February 15, 1956) which is repayable beginning in 1957 at a rate of $3 million per year fixed plus $2,000,000 contingent. The Company also has a $4.5 million bank loan due serially over 13 months.

TWA is considering proposals to purchase aircraft and the related provisioning items to be delivered in the period 1956-1961, at a cost of up to $400 million. This total is derived as follows:

Aircraft		Number	Cost (millions)	
Constellation—Model	1049G	8	$19.9	
	1649A	25	71.7	$ 91.6
Boeing Jet 707*—Model	120	8	46.3	
	320	30	199.5	245.8
Lockheed Electra Turbo-prop		25		62.5
		96	Total	$399.9

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* While the news releases stated only 30 jets in all would be ordered, Mr. Leslie said their financing plans are based on 38 such aircraft.

Hughes Tool Company has already ordered, in its own name, the 33 Constellations and 8 Boeing Jets. The remaining aircraft have not yet been ordered.

TWA has taken care of its immediate problem of financing the $92 million cost of the 8 additional 1049G's and the 25 1649A's which will be delivered in 1956 and 1957. Hughes Tool Company has agreed to take back non-recourse conditional sales agreements (permitted under the ELAS mortgage), due monthly over 5 years, for 100% of the cost. However, the cost of this equipment is still to be considered in the over-all long-term financing program under consideration herein.

Solely on its own earnings record and balance sheet, TWA could not support financing for the total $400 million program. Mr. Leslie, Vice President of Finance and Treasurer, on Wednesday February 8, 1956 reviewed with Messrs. W. A. McCurdy and E. C. White several of the [fol. 23778] factors to be considered in financing such purchases and supplied the attached summaries of the equipment program and will supply within the next ten days cash flow projections and depreciation schedules through 1961.

Among the factors discussed with Mr. Leslie were:

1. Possible supply of equity to be obtained through sale of additional stock;
2. Financing by non-recourse conditional sales agreements with Hughes Tool Company;
3. Bank loans to TWA and Hughes Tool Company by Hughes Tool Company's principal bankers—Irving Trust (maximum $11 million) and Bank of America (maximum $18 million).
4. Possible Hughes Tool Company guaranty of TWA long term loans.
5. Hughes Tool Company credit.
6. Sale of equipment now in operation after delivery of new aircraft.
7. Cash flow, income projections, pro-forma balance sheet positions.

8. Realism of the $400 million cost and delivery estimate (realistic says Mr. Leslie).
9. Debt vs. net worth relationships after financing.
10. Limitation of debt financing to 60% of equipment cost.

If the Society is interested in participating in additional long-term financing for TWA, Mr. Leslie would like to have us present several alternative plans which we might be willing to consider. Based upon Mr. Leslie's very realistic thoughts on the financing problems it is proposed to draft such plans for our consideration.

William A. McCurdy
/s/ E. C. White
Edward C. White

* * * * * * *

[fol. 23792]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 342

Mr. Charles W. Dow, President March 26, 1956

Trans World Airlines, ~~Inc.~~
Equipment S.F. 3¾s, 1969, Reg.

The Society owns all of the authorized $40,000,000 principal amount of the above Equipment mortgage bonds which have been purchased privately at 100 & int. since December 31, 1954.

T.W.A. currently wishes to purchase on a conditional sale basis from the Hughes Tool Company, a) (8) Constellation aircraft Model 1049G, and (25) Constellation aircraft Model 1649A, and engines for these models, estimated to cost in the aggregate approximately $81,500,000 and, b) other spare parts and flight equipment to be installed in such aircraft or used for operation and maintenance, estimated to cost approximately $10,500,000.

Under the terms of the Society's Indenture of Mortgage, dated as of December 1, 1954, the Company is permitted to create, assume or incur conditional sale agreements or other title retention agreements with respect to the total cost of aircraft or aircraft engines acquired, without any limitation upon the aggregate amount of such agreements under which the seller's remedy is limited to repossession of such aircraft or aircraft engines. No provision in the Indenture, however, permits the Company to incur such agreements with respect to flight equipment other than aircraft and aircraft engines.

The Securities Investment Department recommends and requests your approval that the Society consent to a modification of the terms of the Indenture to permit conditional sale agreements of such type, entered into with Hughes Tool Company, to provide for the purchase of, in addition to aircraft or aircraft engines, spare parts and other flight equipment having an aggregate cost not in excess of $10,500,000.

[Stamp—Approved Date 4/6/56—Fin. Comm. Res. No. 225-55—Section A, Par. 2—initialled CWD]

[Handwritten notations—W. McC—WRC—OSS—Done REE 4/10/56]

[fol. 23832]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT NO. 345

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES
SECURITIES INVESTMENT DEPARTMENT

FOR Mr. William R. Cowie,
Vice President

DATED AT NEW YORK May 23, 1956

SUBJECT Trans World Airlines, Inc.—A $10,000,000
Revolving Credit Proposal

On Tuesday, May 22 Messrs. A. V. Leslie, Senior Vice President, TWA, Charles Price, Treasurer, Hughes Tool

Company and TWA Director, and Raymond Cook, of Counsel, Hughes Tool Company, Houston, met with Messrs. Cowie and McCurdy.

TWA proposes that it enter into a revolving credit agreement with the Irving Trust Company and 7 other banks to permit the banks to loan TWA up to $10,000,000 until July 31, 1957 on a revolving credit basis. Repayment is to be in the amount of $2,500,000 at the close of business each July 31, and October 31, 1957, and January 31 and April 30, 1958; TWA's Note would be unconditionally guaranteed, both as to principal and interest, by the Hughes Tool Company. In recognition of this guaranty, TWA would pay the prime interest rate for each 90 day period, there would be a ½ of 1% per annum commitment fee, and there would be no additional security pledged.

Equitable approval is required under Section 4.16 of the Indenture of Mortgage dated December 1, 1954 under which TWA's Equipment Mortgage Sinking Fund 3¾% Bonds due to December 1, 1969 were issued to the Equitable.

The principal reason for establishing the credit was to relieve a tightening cash position due to substantial losses incurred the first quarter of 1956 and substantial capital expenditures for flight and ground equipment, other than aircraft, budgeted for the balance of 1956.

Currently there are outstanding $40,000,000 Equipment Mortgage Bonds (all held by the Society—with first repayment of $1,500,000 due June 1, 1957) and $4,500,000 due to a group of banks headed by the Irving Trust issued under a revolving credit agreement dated December 20, 1954. Monthly payments to the banks on this latter loan in the amounts of approximately $265,000 commenced February 29, 1956 with the final installment due June 30, 1957. This credit is secured by a chattel mortgage on certain flight equipment—insurance recoveries from the recent complete loss of a Martin 404 plane at Pittsburgh will be applied against the April, May and June 1957 payments.

It is suggested that the Society's approval be granted on the condition that any Hughes Tool Company claim against

TWA assets in the event of default is subordinated to the claims of the Society (or any future owner of the Equipment Mortgage Bonds) through its holdings of the Equipment Mortgage Bonds.

/s/ WILLIAM A. MCCURDY
William A. McCurdy

[Handwritten notation—Called A. V. Leslie 5/24/55—Advised ELAS would approve provided Note included stmt subordinating Note to ELAS's Equip Mtge 3¾s—McC]

[fol. 23857]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT No. 349

July 10, 1956

Mr. Oliver S. Swensen
Vice President

Trans World Airlines, Inc.
Equipment S.F. 3¾s, 1969 Reg.

The Society presently owns all of the authorized and issued $40,000,000 principal payment of the Company's Equipment mortgage bonds which have been purchased privately at 100 & int. since December 31, 1954.

TWA has, and expects to have for the next two years, a tight working capital position. This is the direct result of lower than anticipated earnings during the 1955-1956 winter and 1956 spring seasons.

On February 1, 1956 TWA borrowed $4,500,000 from its banks, under a revolving credit agreement authorized under the Equipment Mortgage indenture. These loans are being repaid in equal monthly installments from February 28, 1956 through June 30, 1957. This amount represented the maximum amount available under the revolving credit agreement.

The indenture under which the Equipment Mortgage was issued limits TWA's ability to incur indebtedness for money borrowed, other than for the purchase of flight equipment and under the revolving credit agreement and for certain other specified purposes. These provisions do not provide TWA with enough authorization to obtain the additional working capital it will require.

TWA proposes that, in addition to the $4,500,000 borrowed under the revolving credit agreement, it will need $10,000,000 of additional borrowed funds to maintain its required working capital position. The Company plans to repay these borrowings in equal installments of $2,500,000 on August 1 and November 1, 1957, and on February 1, 1958; the balance would be due on or before April 30, 1958. The notes representing this loan shall be subordinate to the Society's Equipment Mortgage bonds and shall bear interest for each day at the then prevailing prime rate for commercial loans in New York, N. Y.

TWA wishes to borrow this $10,000,000 from Hughes Tool Company, and Hughes Tool Company is willing to loan $10,000,000 to TWA upon the above conditions. Hughes Tool Company is the present owner of 74.26% of TWA's common stock.

The Securities Investment Department recommends and requests your approval that the Society consent to a modification of the appropriate provisions of the Equipment Mortgage Indenture to permit TWA to borrow up to $10,000,000 from Hughes Tool Company, the notes to mature no later than April 30, 1958 and to be subordinate to the Equipment Mortgage bonds owned by the Society issued under the Indenture of Mortgage dated as of December 1, 1954 from Trans World Airlines, Inc. to Irving Trust Company as Trustee.

[Off. Approved Date 7/13/56—Fin. Comm. Res. No. 225-55 —Section A, Par. 2—initialled OSS]

[Handwritten notations—W McC—WRC—Done—REE— 7/17/56]

[fol. 24356]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SPECIAL MASTER'S EXHIBIT NO. 3

MERRILL LYNCH, PIERCE, FENNER & BEANE
SEVENTY PINE STREET
NEW YORK 5, N. Y.
TEL. WHITEHALL 4-1212

April 23, 1957

Mr. A. V. Leslie
Senior Vice President—Finance
TWA
380 Madison Avenue
New York 17, N. Y.

Dear Vic:

This will summarize the results of our meeting today with Bill Cowie, Vice President in Charge of Investments of the Equitable Life Assurance Society, in connection with our efforts to place for TWA a total of $50,000,000 of notes secured by a chattel mortgage on Lockheed Model 1049-G and 1649-A airplanes. My partner, Gillette Martin, accompanied me.

We made the firm recommendation to you on Friday, April 19, that in our opinion it was necessary for TWA to sell common stock instead of subordinated convertible debentures to the extent of at least $34,000,000 and that we thought it would help the whole picture if a larger amount of stock could be issued. I will not review the pros and cons of stock versus subordinated debentures but we feel the arguments are convincing.

After sitting in on your discussions with your two lead banks and although we were not ready to approach potential institutional investors because the overall plan had not jelled, we did call on the Equitable Life this day.

The premise that we have been working on and which has also been uppermost in your lead bank's mind is that it will be necessary to have the Equitable's participation to have a successful placement of the $50,000,000 of secured debt. Our visit to the Equitable today was to get their view on the alternatives—subordinated convertible debentures or common stock.

After we had brought Mr. Cowie up to date on our activities since April 12, the date of our last meeting, he stated that he would not go to his investment committee to request permission for TWA to issue subordinated convertible debentures at this time. He said that any serious considera- [fol. 24357] tion by Equitable in making and urging acceptance of such a request to the committee would consume weeks of time as they had done no work at all on the terms of such an issue but were certain that these terms would be extreme in character. He also stated that it was an obvious advantage to TWA to issue common stock so that it would have the ability to use subordinated convertible debentures as a future source of financing. He further expressed grave doubt whether his committee or any other institution would consider part of the $50,000,000 loan if there were an additional $34,000,000 of debt placed on the company at this time even though the subordination terms were drastic.

We asked Mr. Cowie the direct question whether we could come back and see him in a matter of days to explore his ideas of proper provisions for the proposed $50,000,000 of secured notes, and he replied that he was available at any time. We also took occasion to review with him the statement which he had made on April 12 that Equitable was willing to consider a participation in the $50,000,000 of these notes and he reiterated that they are open minded about this but only to the maximum extent of $5,000,000. He added the further reiteration that a participation by Equitable would also be contingent on favorable operating results by TWA over the next several months. He realizes that what we are talking about is a six month's period before the contemplated bank loan will be converted to a term loan.

Sincerely yours,

Merrill Lynch, Pierce
Fenner and Beane

By /s/ W. A. Forrester, Jr.
W. A. Forrester, Jr.

[fol. 25193] IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EXHIBIT "A" TO MEMORANDUM OF DEFENDANT HUGHES TOOL COMPANY IN OPPOSITION TO APPLICATION OF CERTAIN ADDITIONAL DEFENDANTS FOR REVIEW OF RULING OF THE SPECIAL MASTER

[fol. 25212]

MELLON NATIONAL BANK AND TRUST COMPANY

MEMORANDUM TO File October 7, 1960

RE: TRANS-WORLD AIRLINES

Another TWA meeting was held yesterday at the Irving Trust Company. In addition to the banks, the group also included Mr. William Cowie of Equitable, Messrs. Gullander and Knight of General Dynamics Corporation and Messrs. Holiday, Cook and Gray from the Hughes Tool Company.

At this meeting two additional plans to finance the acquisition of the Convair 880's were presented. The first was presented by the Tool Company. The essence of this plan is that the Tool Company would substitute itself for General Dynamics and put $30MM additional into TWA by liquidating real estate. The real estate sold to the Howard Hughes Medical Institute, who would in turn borrow $30MM and put up as security all the stock of the Hughes Aircraft Company. The second plan submitted was Mr. Leslie's so called Three-Phase Financing Plan which calls for new bank loans by the banks and Convair of $25MM each.

Raymond Cook, Hughes' attorney, had already been told by Ben Sessel that any plan proposed by the Tool Company that did not include a voting trust arrangement would not be viewed sympathetically by the banks. For the record, Hughes related to Sessel a few days ago that if worse came to worse, "a voting trust is preferable to receivership." This was the first indication that Hughes could perhaps be pressured into a voting trust arrangement. With this likelihood in mind, it was decided to tell Hughes that; (i) no more loans will be made to TWA without an immediate voting trust agreement; (ii) the banks are ready to proceed with the Dillon-Reed plan if the insurance companies reaffirm their commitments; (iii) should Hughes not accept these provisions, the banks will set off deposit balances against loans at the opening of business on October 7; and (iv) this is a final decision and no more plans will be considered. Hughes was given until 5:00 Eastern Daylight Savings Time to make up his mind.

Ben Sessel called me last night and related that Hughes has signed a letter, as President of the Hughes Tool Company, confirming that he will trustee his stock immediately. This letter was delivered at the B of A's main office yesterday afternoon. It contains a provision that TWA has the right to refinance the indebtedness at any time without penalty. The Equitable had agreed to this point at the meeting yesterday. Mr. Cowie also indicated that the Equitable was willing to go along with the original Dillon-Reed plan.

George T. Farrell
Credit Division

bt

[Handwritten notation—H.]

[Stamp—Confidential]

[fol. 27470] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, Defendants.

PRE-TRIAL ORDER—December 18, 1961

Plaintiff having brought on a motion, pursuant to Rule 34, Federal Rules of Civil Procedure, for the production and inspection of documents and argument having been had thereon on October 2, 1961, and plaintiff having appeared in support of said motion by Cahill, Gordon, Reindel & Ohl, Esqs. (John F. Sonnett, Esq. and Paul W. Williams, Esq., of counsel) and defendant Hughes Tool Company having appeared in opposition thereto by Chester C. Davis, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, Esqs. (Jay H. Topkis, Esq., of counsel) and Andrews, Kurth, Campbell & Jones, Esqs., (Raymond A. Cook, Esq., of counsel), and due deliberation having been had thereon, and the court having rendered its decision in a Memorandum Opinion dated December 5, 1961, it is hereby

Ordered, that:

1. Plaintiff's Motion for an Order, pursuant to Rule 34 of the Federal Rules of Civil Procedure, directing the pro- [fol. 27471] duction and permitting the inspection and copying of documents, papers, books, letters and other material in the possession, custody and/or control of defendant Hughes Tool Company as designated in the schedule annexed to said Motion, is granted.

2. The depositions heretofore scheduled by defendant Hughes Tool Company under its notices are hereby rescheduled to commence on January 5, 1962 in the order and sequence noticed and the depositions heretofore scheduled by plaintiff under its notices are hereby rescheduled to commence on April 3, 1962 in the order and sequence noticed.

3. The production of writings and other material by defendant Hughes Tool Company pursuant to this order shall be made on March 15, 1962.

4. Pursuant to the provisions of Rule 30(b) of the Federal Rules of Civil Procedure, all income tax returns and financial statements of defendant Hughes Tool Company produced pursuant to this Order for inspection and copying shall not, without further order of this court, be disclosed publicly by plaintiff or its counsel except in connection with the preparation, pretrial proceedings and trial of this action or any other action or proceeding in which any of the parties herein are participants.

Dated: New York, N. Y., December 18, 1961.

Charles M. Metzner, U. S. D. J.

[fol. 27473]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

vs.

HOWARD R. HUGHES, HUGHES TOOL COMPANY
and RAYMOND M. HOLLIDAY, Defendants

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES et al., Additional defendants on counterclaims.

Transcript of Hearing—New York, September 6, 1962; 11:30 o'clock a.m.

Before: Hon. Charles M. Metzner, District Judge.

[fol. 27474]

APPEARANCES:

Cahill, Gordon, Reindel & Ohl, Esqs., Attorneys for plaintiff; John F. Sonnett, Esq., Dudley B. Tenney, Esq., and Marshall Cox, Esq., of Counsel.

Chester C. Davis, Esq., Attorney for defendants Hughes Tool Company and Raymond M. Holliday; Lola S. Lea, Esq., and Maxwell E. Cox., Esq., of Counsel.

Winthrop, Stimson, Putnam & Roberts, Esqs., Attorneys for additional defendants Irving Trust Company and Ben-Fleming Sessel; Silas M. R. Giddings, Esq., of Counsel.

Dunnington, Bartholow & Miller, Esqs., Attorneys for additional defendant Dillon Reed & Co., Inc.; William M. Bradner, Esq., of Counsel.

Chadbourne, Parke, Whiteside & Wolff, Esqs., Attorneys for additional defendant Charles C. Tillinghast, Jr.; Richard S. Harrell, Esq., of Counsel.

Cravath, Swaine & Moore, Esqs., Attorneys for additional defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates and Harry C. Hagerty; Thomas D. Barr, Esq., of Counsel.

[fol. 27475]

COLLOQUY BETWEEN COURT AND COUNSEL RE REPLY AFFIDAVIT OF TWA AND SERVICE THEREOF

The Court: You may proceed, Mr. Sonnett.

Mr. Sonnett: May it please the Court, we have served with our motion a memorandum which sets forth the chronology of our efforts to obtain some disclosure of information as to the whereabouts of Howard Hughes, and I don't propose to burden the Court with a recital of that chronology except to point out that we started in March of this year and we are still at it.

I will have a reply affidavit in a moment to serve which I think contains some exceedingly significant information. Before coming to that, may I say to the Court that I believe on the basis of the record to date, and in light of your Honor's letter to counsel, in which you stated when returned a photocopy of the alleged authority that you would expect compliance with the Court's order so that the interrogatories will be answered on the 27th of August, but I think your Honor made crystal clear, if there was any doubt about it, and there wasn't, that Hughes Tool Company was to supply this information.

Instead of doing that, the Hughes Tool Company elected to disregard the Court's two prior orders and the Court's [fol. 27476] letter. Now it seems to me that the attitude demonstrated by the Hughes Tool Company is in such willful and deliberate disregard of specific unambiguous directions by the Court that the contempt shown to the orders of the Court is more grievous than that shown in the Friedman case in which Judge Sugerman granted a default judgment in excess of 12 million dollars.

In that situation—I don't know whether your Honor has had a chance to see the text of the memorandum opinion, may I hand it up? Unfortunately I only have one copy.

The Court: Has it been published?

Mr. Sonnett: No, sir.

The Court: I will get a copy from Judge Sugarman. What is the title?

Mr. Sonnett: Friedman v. United States Trunk Company, 62 Civil 73, and the memorandum is dated August 16, 1962.

In that situation, where a defendant ignored a notice to take depositions, ignored a motion for a default and simply did not appear, Judge Sugarman, having found that there was a deliberate refusal to pay any attention to the Court's [fol. 27477] orders, had no difficulty in awarding a default judgment in excess of 12 million dollars.

The record in this situation, I submit, is much more serious because here there is a crystal clear proof of specific notice contained in a direction by the Special Master to the effect that he would not interfere in the slightest with this Court's order by reason of any alleged authority that Mr. Davis had to accept process.

The direction of this Court in its two orders and in the letter most recently sent it, I think, open to no misunderstanding.

I think that the conduct, therefore, of Hughes Tool Company can only be characterized for what it was, a deliberate, willful intention to refuse to comply with the directions of the Court.

I might rest at that point, your Honor, but something has come to my attention in point of fact only definitely yesterday and last night. It has led to the necessity to file reply affidavits which contain very grievous charges against the Hughes Tool Company.

I would like to hand the affidavit up and serve it now. I regret that I could not do it sooner. In point of fact, my [fol. 27478] affidavit was just finalized and signed this morning. If your Honor would wish to read the affidavit, it would be a lot easier than my recital of it.

The first five paragraphs is set forth substantially what I have already said. The new material is contained in paragraph 6.

After very careful and thorough consideration of the gravity of the charges made in this affidavit, I felt impelled to make the charges there contained—

The Court: They are serious charges.

Mr. Sonnett: The serious charge is that the Hughes Tool Company deliberately submitted to this Court, in an attempt to defraud the Court and mislead it, a forged document.

Your Honor will note that annexed to my affidavit is an affidavit by a leading examiner of questioned documents, Mr. Charles Andrew Appel, Jr.

Mr. Appel's qualifications cannot be gainsaid. For many years he was a special agent of the FBI in charge of document work and since his retirement from the FBI he has been engaged in a great number of cases of major significance.

I had Mr. Appel come up because I was concerned when [fol. 27479] I saw this alleged authorization, and I had him come to New York and he did yesterday morning. We spent the entire day on this matter.

Your Honor will find he set forth in detail his reasons in the exhibits annexed for the conclusion that Howard R. Hughes did not make the signature contained on the so-called authorization represented to this Court to be an authorization to accept service of process.

I would like to make it clear that I have no information, nor do I personally believe, that Mr. Davis had any knowledge of this. However, I represent to your Honor that on the record before you it is beyond doubt that somebody in the Hughes Tool Company wilfully, knowingly, purposefully, in order to mislead counsel for TWA and this Court, submitted a forged document.

I think on that ground alone your Honor should strike the answer and give us a default judgment.

If your Honor has the slightest doubt about it, I am prepared to call Mr. Appel to the stand right now. He is here for cross-examination. I think your Honor should direct, if you have the slightest doubt—and this record admits of [fol. 27480] no doubt—that everyone connected with the Hughes Tool Company who had any connection with the forged authorization be called before this Court to testify under oath forthwith.

The Court: Mr. Sonnett, obviously your opponent has just been served with this document three minutes ago and should be afforded an opportunity to answer the serious charges contained in your affidavit. I will give the attorney for the Hughes Tool Company one week to submit affidavits in refutation of these charges.

Aside from this charge, Mrs. Lea, the charge that the signature of Howard Hughes to the purported authorization for Mr. Davis to accept service in this proceeding is forged, have you anything else to say regarding the motion of Mr. Sonnett to strike your answer?

Mrs. Lea: In the first instance I would like to point out, as your Honor is aware, that I have just been served with this piece of paper. I think the charges are undoubtedly ridiculous and completely without foundation. I appreciate your Honor's indulgence in giving us time to formally [fol. 27481] make any statement with respect to those charges. I wish, however, to point out that the written authorization was merely confirmation of authority which had been received, and I am not quite sure that this affects the problem whatsoever.

As a matter of fact, at this posture of the proceedings I don't think we any longer have a problem. The problem has been mooted for the reason that the United States Marshal for the Southern District of California has indicated this morning that he served Mr. Hughes by delivering a copy of the subpoena to Mr. Davis who was authorized to accept that subpoena on Mr. Hughes' behalf. The return has been filed and is in the office of the clerk.

As far as I can determine, at this point there is no question of service open for decision.

The Court: Was the service made on the exhibition by Mr. Davis of the authorization that you have filed in this court?

Mrs. Lea: I believe the service was made upon a delivery to the United States Marshal of an affidavit by Mr. Davis, indicating he was in fact authorized to accept service, and it was on the basis of Mr. Davis' affidavit that—

[fol. 27482] The Court: It seems we are having a lot of last minute developments today, first a charge of forgery and then a statement that Mr. Hughes was actually served.

Do you know of any service by the United States Marshal for the Southern District of California, Mr. Sonnett?

Mr. Sonnett: In the light of the unsatisfactory state of the record, we did make an effort several weeks ago to serve Mr. Hughes in Beverly Hills. We made that effort with private investigators and with the United States Marshal. The effort was unsuccessful.

Thereafter, I am told—I was not here—that Mr. Davis represented that he was going to be here in court today to deal with this matter. Apparently what he saw fit to do was to go out and try to blunt the point of this motion and to frustrate it by going to the Marshal and saying, "Look here, I am authorized to take it for Mr. Hughes."

I regard what Mr. Davis has done, and I think the Court should, as a nullity.

Moreover, I think that in the light of the very well founded charge that a fraud was attempted to be worked [fol. 27483] on this Court that all matters should be held in abeyance until the Court determines whether to call witnesses in here under cross-examination to find out how widespread the scheme was. All I can say is that one of the leading document examiners in the United States tells me and tells the Court under oath, and he is here for cross-examination and will be at any time if anybody wants him, that the signature on that authorization is not the signature of Howard R. Hughes.

I don't know what kind of games Mr. Hughes or the Hughes Tool Company thinks they can play with the Court of the United States. I for one do not think they can play that kind of game. I don't know if your Honor wishes me to have Mr. Appel available for cross-examination today or a week from now, but he will be available at any time.

The Court: I will deal with the allegation of forgery separate and apart from the problem of the authorization, its legal effect and whether service was actually made on Mr. Hughes today.

So, Mr. Appel, if necessary, will be called at some time in the future after I have received the answering affidavits of the defendant Hughes Tool Company to the charges [fol. 27484] contained in your reply affidavit which they were just notified of this morning. At that time we can take care of that problem.

When is the return date of the subpoena that was served this morning, Mr. Sonnett?

Mr. Sonnett: If it was served, my understanding of what Mrs. Lea said is that the service was on Mr. Davis as the alleged agent of Mr. Hughes. If that constitutes service, which I doubt in these circumstances, the return date of the subpoena would be September 24th.

The Court: If Mr. Hughes appears on September 24th, then hasn't all of this been moot?

Mr. Sonnett: If there was, as I believe, fraud on the Court, the question of the punishment the Court wishes to impose for what I regard as contempt, if Mr. Appel is right somebody ought to be punished for attempting to misrepresent this document to this Court.

The Court: I have never relied on that document, and that is why I returned it twice, the two times that it was submitted to me, first on a confidential off-the-record basis [fol. 27485] and then in conjunction with an affidavit to seal it.

My letter clearly indicated that I wanted nothing to do with that document. You could file it if you wanted to, but I was not going by any action on my part to indicate that I accepted that document or rejected it. It was a question which would have to be presented in the normal fashion.

My letter indicated that any further negotiations between Mr. Davis and you be had directly with you, and the Court was not going to be part of it.

Mr. Sonnett: Yes.

The Court: That was the reason for it. I did not know what that document meant, whether it had any meaning at all. It was on a blank piece of paper without a date, without an address, without any mention of this case, so until you two were willing to present it to the Court in a more formal fashion, I was refusing to have anything to do with it.

The first step was taken, I think, last Friday when the attorney for the defendant did serve me with a copy and did file it in this court.

Mr. Sonnett: When we then had a chance to analyze [fol. 27486] that document for the first time, we found all of the defects you pointed out but we found one more, it was not only a nullity legally but it was a fraud.

The Court: I am not saying it was a nullity legally. I purposely refused to touch the piece of paper because I did not want to have any action taken by me as any indication that I was passing upon the legal effect of the document.

Mr. Sonnett: Exactly. You then said to counsel for Hughes Tool Company that they would be expected to answer.

The Court: They did not work out anything with you, that is why I added the last sentence that they carry out further conversations with you.

Mr. Sonnett: Nothing was done except to refuse to comply with the orders of the Court.

The Court: We have two problems.

Is Mr. Hughes going to appear on September 24th? By doing that, I suppose he would validate whatever affidavit Mr. Davis gave to the United States Marshal today to justify acceptance of service of the subpoena on his part.

The other problem is the document that has been filed in [fol. 27487] this court which you claim is a forgery.

So we will have to let both of them stand in abeyance. The first one until September 24th and the second one to the filing by the attorney for the Hughes Tool Company on a week from today an answer to the charges contained in your reply affidavit that you served on defense counsel ten or fifteen minutes ago.

If you want additional time after receipt of that answer to file a reply, you may have it.

Mr. Sonnett: I would like to have three days after the receipt of the affidavit within which to file any further affidavits or to seek leave of the Court to examine under oath those who participated in what I regard as a deliberate attempt to commit a fraud on this Court.

The Court: All right.

Mrs. Lea: May I clarify several things on the record.

First, the reference by Mr. Sonnett to Mr. Davis' intention or representation to be here today. He was intending to, but it was only late yesterday afternoon that we were informed by counsel for the Hughes Tool Company in [fol. 27488] California that the Marshal then had in his hands a subpoena to serve on Mr. Davis for accepting service for Mr. Hughes. He did not learn until close to six o'clock that was in fact the case, and he made himself at that time available, assuming in so doing that he would doing exactly that which TWA had been seeking or at least which it claimed to have been seeking, and which was to see to it that service was in fact effected.

With respect to the date of September 24th, I would like to point out to your Honor that the notice of taking deposition does mention the 24th day of September, and then goes on to say, as indeed I believe it must under the order of your Honor as well as the order of the Special Master, or such other time or place as may be fixed by order of the Court or by agreement.

Mr. Hughes is not scheduled to be reached for deposition until some time after the Tool Company has had an opportunity to complete the discovery in which it is now engaged.

I doubt now merely by filing a new notice and making a whole lot of unfounded charges that TWA could conceivably be permitted to interrupt that schedule or interrupt [fol. 27489] the Hughes Tool Company's discovery in that fashion.

The Court: How is the deposition of Mr. Tillinghast proceeding?

Mrs. Lea: The deposition of Mr. Tillinghast has been completed. The Hughes Tool Company is now deposing the next TWA witness who is Mr. Leslie. Because of the problem of personal privilege of Mr. Leslie, we are going to be examining Mr. Rommel next week.

We are proceeding with the depositions fixed in your Honor's schedule as rapidly as we can. We are in the midst of our discovery.

The Court: How long is that going to last? I had the impression once you got through with Mr. Tillinghast that you would move quite rapidly.

Mrs. Lea: We will certainly do our best to be as expeditious as we can. How long it will take, I cannot tell you, I just do not know.

The Court: I think, Mr. Sonnett, you may be advised to make an application to the Special Master, if you think it is necessary and proper, that the completion of the examination by the Hughes Tool Company by TWA may be suspended in order to proceed with Mr. Hughes on September [fol. 27490] 24th.

Mr. Sonnett: Yes, your Honor.

The Court: Frankly, I am very much interested to see if Mr. Hughes is going to show up in view of all the charges thrown back and forth here.

Apply to the Special Master. If the Hughes Tool Company is dissatisfied with the ruling of the Special Master, they may appeal this ruling to me.

Mr. Sonnett: Yes, sir, we shall do so promptly.

The Court: You may have until September 17th to file a reply to Mrs. Lea's affidavit which is due September 13th.

Mr. Sonnett: I trust the affidavits to be submitted on behalf of the Hughes Tool Company will be affidavits by those people who participated in the preparation of the document, not hearsay by counsel, we have had too much of that.

The Court: We will judge the affidavits when they are submitted.

Mr. Sonnett: Yes, your Honor.

(Adjourned sine die.)

[27490a] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 27713] Copy

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHESTER C. DAVIS
120 BROADWAY
NEW YORK 5, N.Y.
DIGBY 9-0660

BY HAND August 24, 1962

Re: *TWA* vs. *Hughes Tool Company, et al.*

Hon. Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York, N. Y.

Dear Judge Metzner:

Referring to your letter of August 21, 1962, there is enclosed a copy of the written authority from Mr. Hughes to Mr. Davis for inclusion in the record in this case.

A copy of the authorization was this day served upon Messrs. Cahill, Gordon, Reindel & Ohl under cover of a letter dated August 24, 1962 to Mr. Zeller, a copy of which is enclosed.

Very truly yours,

/s/ LOLA S. LEA
Lola S. Lea

Encls. (2)
cc: J. Lee Rankin, Esq.
All counsel
(Without enclosures)

[fol. 27844]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CAHILL, GORDON, REINDEL & OHL
EIGHTY PINE STREET
NEW YORK 5, N. Y.

January 18, 1963

Re: *TWA* v. *Hughes, et al.*

Dear Judge Metzner:

In view of the Special Master's statement yesterday that no alteration in the place for the Hughes deposition should be considered unless suggested by the defendants prior to 5:00 P.M. next Monday, and his further request that this matter be brought to your attention, I believe that the facts set forth in the enclosed memorandum dated January 17, 1963 should be brought to your attention. The writer, Mr. Dunham, is an associate of this office who returned yesterday from a 3-day trip to California in connection with arrangements for the deposition.

Very truly yours,

JOHN F. SONNETT

Hon. Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York 7, N. Y.

[Enclosure]

cc: Special Master
All Counsel

[fol. 27845]

MEMORANDUM January 17, 1963

Re: *TWA* v. *Hughes, et al.*

The following arrangements are being made on behalf of TWA for the deposition of Mr. Hughes in Los Angeles starting February 11, 1963:

A. Chief Judge Hall of the U. S. District Court, Southern District, U.S. Marshal O'Brien and Deputy Clerk Drew advise:

1. There will be made available starting February 11, 1963 in the Federal Court House in Los Angeles a Hearing Room, Room 229, which appears highly satisfactory with a judge's bench for the presiding officer, witness box, counsel tables and seating capacity for approximately seventy-five persons. There will also be made available an adjoining room for purposes of storing documents, etc. overnight. Both these rooms can be locked and, of course, are protected by the general security measures of the Federal Court House.

2. The work of the existing staff of Marshals will not permit the use of court marshals or deputies in the Hearing [fol. 27846] Room for purposes of maintaining order should that be necessary. Marshal O'Brien, however, has cleared with the appropriate authorities in Washington, D.C. an arrangement whereby persons experienced in this work will be deputized by the U.S. Marshal and will be present with all necessary authority. No appropriation is available for the payment of salaries for such deputies and the parties will bear the cost. The daily salary is $12.00. A formal request by the Special Master for such deputies should be made. At least 10 days prior notice is required by the Marshal to enable the steps necessary to deputize the deputies.

3. Chief Judge Hall advises that he will be available to act upon any matters that may arise during the course of the examination in aid of the Special Master if such should be necessary.

4. The Court Reporter staff will be able to provide all necessary stenographic services for the transcript of the depositions should arrangements with them appear most desirable. The Court Reporter staff should be given notice promptly to enable them to make the necessary arrangements in their schedules.

[fol. 27847] B. Within approximately a mile of the Federal Court House there is available both office space and hotel space.

1. Adequate office space for TWA lawyers and staff (1864 sq. ft) is now available for working quarters, file rooms, Zerox machine, etc. This office space is across the street from the office of local counsel with whom arrangements have been made for extra secretarial help and the use of other facilities including a law library.

2. Arrangements have been tentatively made for this space which is economically most advantageous ($850 a month). This space will require certain modifications by the landlord which will entail approximately two and one-half weeks time. This space is being rented at the "going rate" without the substantial premium otherwise involved for rentals on a short term or temporary basis.

3. Office equipment, Zerox machines, etc. are available on a rental basis on short notice with the exception of file cabinets. The TWA offices in Los Angeles should be given a weeks prior notice for this and telephone service.

Of the two hotels which are adequate for our purposes and convenient to the office space, the Statler Hilton is already [fol. 27848] sufficiently booked so that they cannot provide us with the combination of accommodations which we will need. Adequate living quarters are available at the Biltmore hotel at comparable rates ($107 a day for 7 persons), but again, we should notify them of our exact requirements as promptly as possible.

C. B. Dunham

[fol. 27851]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CAHILL, GORDON, REINDEL & OHL
EIGHTY PINE STREET
NEW YORK 5, N. Y.

January 24, 1963

Re: *TWA* v. *Hughes, et al.*

Dear Judge Metzner:

We enclose herewith a copy of the transcript of the proceedings had yesterday afternoon before the United States Court of Appeals for the Second Circuit, at which hearing that Court:

(a) Dismissed the purported appeal which the defendant Hughes Tool Company ("Toolco") sought to take from Your Honor's Orders of January 10, 1963, and January 19, 1963;

(b) Denied the defendant Toolco leave to petition for a Writ of Mandamus or Prohibition against Your Honor with respect to such Orders;

(c) Denied the defendant Toolco a stay of all provisions of Your Honor's Orders, including the order that it produce for copying and inspection by the plaintiff and the additional defendants certain documents as to which Toolco has asserted the attorney-client privilege.

We understand that a copy of the transcript of proceedings held yesterday afternoon before the Special Master has been furnished to Your Honor. At that hearing Toolco refused to produce the above-described documents pursuant to Your Honor's Order and further signified its intention to refuse to comply with any orders of the Court pending determination of its motion to dismiss (Tr. pp. 5-6, 10-11, 13, 19). We are at this time considering what steps are appropriate for us to take on behalf of the plaintiff by reason of Toolco's refusal to comply with the Court's Orders. [fol. 27852] Additionally, we are enclosing a copy of an Order by the Special Master dated January 22, 1963, ordering Toolco to produce, for copying and inspection, certain documents sought by the plaintiff and additional defendants pursuant to Rule 34 of the Federal Rules of Civil Procedure. In such Order the Special Master directed that any appeal from this Order taken by Toolco should be filed prior to 5 P.M., January 25, 1963.

During the course of the proceedings held before the Special Master yesterday, Toolco indicated its intention to seek review by Your Honor of the Special Master's Order of January 22, 1963 (Tr. p. 19). In view of the urgent need of the plaintiff and the additional defendants to have these documents available to them for use in the deposition of Mr. Hughes which will commence on February 11, 1963, we respectfully request that the hearing by Your Honor of Toolco's motion to review the Master's Order of January 22 be scheduled for Monday, January 28, 1963.

In light of yesterday's decision by the Court of Appeals, we further respectfully request that the hearing of Toolco's motion dated January 22, 1963 (seeking an order that the deposition of Mr. Hughes be delayed pending final adjudication of Toolco's motion to dismiss) be advanced from February 8, 1963, as noticed by Toolco, to January 28, 1963.

I have informed counsel for the additional defendants of the contents of this letter, and they have indicated their concurrence therein.

Respectfully yours,

Hon. Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York 7, N. Y.

[Enclosures]

cc: All Counsel
Special Master
(without enclosures)

[fol. 27859]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

January 25, 1963

Hon. Chief Judge Peirson M. Hall
United States District Court for
the Southern District of California
Federal Building
Los Angeles 12, California

Re: *Trans World Airlines, Inc. v. Howard R. Hughes, et al.*

United States District Court
Southern District of New York

61 Civ. 2324

Dear Chief Judge Hall:

Enclosed is a copy of the order of Judge Charles M. Metzner dated January 19, 1963 in the above-entitled action. As this order reflects, this action was assigned to Judge Metzner on August 31, 1961 pursuant to rule 2 of the Generaleral Rules of the United States District Court for the Southern District of New York. The parties having requested that a Special Master be appointed to supervise the deposition proceedings in this action, I was designated by the Court as Special Master for this purpose on February 7, 1962, a copy of which order I also enclose.

The pre-trial examination of Howard R. Hughes by plaintiff and others, at which I am directed to preside, is to commence at 10:00 A.M. on February 11, 1963 at the Los Angeles Court House, Los Angeles, California, under order of Judge Metzner dated January 10, 1963, a copy of which is also enclosed, and the order of January 19, 1963.

Since Judge Metzner's order of January 19, 1963 the United States Court of Appeals for the Second Circuit has denied defendant Hughes Tool Co. applications for a stay, for leave to file a petition for mandamus and has dismissed its appeal taken from that order.

[fol. 27860] The order of January 19, 1963 provides:

> "At the hearing before the Special Master on January 17th, counsel for defendant was reluctant to indicate whether he desired to hold the deposition at some place other than the United States Courthouse in Los Angeles. As counsel for the plaintiff and the additional defendants have indicated, they are amenable to cooperate in any reasonable request of counsel for the defendant, but it is necessary that advice of a change be given so that necessary arrangements can be made. Consequently, unless counsel for the defendant indicates by noon on January 22nd, 1963 a desire to change the designated place, the deposition shall proceed in the United States Courthouse in Los Angeles."

Counsel has not indicated any such desire, and consequently the deposition will be held in the Courthouse.

I have been advised by counsel for plaintiff that arrangements have been made, with your Honor's permission, for the use of the Hearing Room, Room 229, in the United States Court House in Los Angeles for the deposition.

I have also been advised by counsel for plaintiff that with the assistance of U. S. Marshal George E. O'Brien persons with appropriate experience may be deputized to attend the deposition for the purposes of maintaining order or otherwise assisting in securing the proper conduct of the proceedings provided that the salaries for such deputies are paid by the litigants. I understand that the salary for each deputy will be $12.00 per day.

I therefore request that Marshal O'Brien make such arrangements as may be necessary to secure the attendance of two persons, deputized by the U. S. Marshal, at each day of the deposition starting February 11, 1963. I understand from counsel for plaintiff that the deposition may extend for several months.

I am sending a copy of this letter to U. S. Marshal O'Brien.

[fol. 27861] On behalf of Judge Metzner and myself, I wish to thank you for your assistance and cooperation and I look forward to meeting with you when I am in Los Angeles.

Respectfully yours,

/s/ J. Lee Rankin
J. Lee Rankin

JLR/lmh

Enclosures

cc: U. S. Marshal George O'Brien
Federal Building
Los Angeles 12, California

Judge Charles M. Metzner

To All Counsel

[fol. 27863]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES 12, CALIFORNIA

January 29, 1963.

PEIRSON M. HALL
CHIEF JUDGE

AIR MAIL

J. Lee Rankin, Esq.
36 West 44th Street
New York 36, New York

Re: *T.W.A. v. Howard R. Hughes et al.—*
U.S. District Court, S.D. New York—
61 Civil 2324

My dear Mr. Rankin:

Reference is made to your letter of January 25th concerning the taking of the deposition of Howard R. Hughes now set to commence on February 11, 1963, in the Federal Building here.

Enclosed for your information is photocopy of a letter I just received from Chester C. Davis, counsel for the Hughes Tool Company.

Your letter of January 25th to me indicated you had sent a copy to all counsel. Mr. Davis' letter did not indicate that he had sent a copy of his letter to you. Hence, I am enclosing a copy herewith, and am sending a copy of this letter to Mr. Davis.

Cordially yours,

/s/ PEIRSON M. HALL
PEIRSON M. HALL
Chief Judge

cc: Chester C. Davis
120 Broadway
New York 5, New York

[fol. 27870]

[Stamp—Office Copy—Signed 1/29/63 N—Docket—1/31/63 WB—Diary—not entered N—Charge OV]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHESTER C. DAVIS
120 BROADWAY
NEW YORK 5, N.Y.
DIGBY 9-0660

[Stamp—Copy]

BY HAND

January 29, 1963

Re: *TWA* vs. *Hughes Tool Company, et al.*

Hon. Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York 7, N. Y.

Dear Judge Metzner:

At yesterday's hearing Your Honor inquired whether I had discussed with my client that portion of my letter to Your Honor of January 23, 1963 respectfully declining to produce certain documents as to which Toolco claims a presently existing and non-waived attorney-client privilege. I replied that I had discussed the matter with my client; I do not yet have a copy of the transcript of the hearing, but that is my recollection of what took place. I would like to explain my answer and the basis therefor.

My letter to Your Honor of January 23rd was a decision which I made as counsel for Toolco without discussion at that time with my client. However, prior thereto I did discuss with responsible officers of Toolco the nature and effect [fol. 27871] of the orders of January 10 and January 19, 1963, including the desirability of bringing on the Motion to Dismiss and the amount of time that Your Honor granted to brief the matter and my problems in connection therewith; the reviewability of interlocutory orders with particular reference to the production of privileged documents involving an attorney-client relationship and the desirability of exhausting all possibilities of review in connection therewith; the burden and expense upon Toolco of further discovery as contemplated by plaintiff; and the alternatives available to Toolco in the event Your Honor should refuse to stay further discovery by plaintiff pending a determination of the Motion to Dismiss.

Subsequent to my letter of January 23, 1963, I discussed with responsible officers of Toolco the results of my efforts to obtain a review by the Court of Appeals of the orders of January 10 and January 19 and the action taken by me as counsel for Toolco as reflected by my letter to Your Honor of January 23, 1963. At that time I again reviewed with my client the distinction between reviewable and non-reviewable orders of the Court, the alternatives available to Toolco in the circumstances; the merits of the Motion to Dismiss; [fol. 27872] the possible as well as the probable consequences of insisting on a reviewable order prior to the further production of the documents involved and insisting upon determination of the Motion to Dismiss prior to responding to any further discovery by plaintiff. I also discussed the effect of the decision of Your Honor, which denied the application for Rule 16 proceedings and which also denied answers to interrogatories propounded to plaintiff prior to the oral examination of Mr. Hughes, on the feasibility of admitting whatever plaintiff could assert so as to be in a position to dispose of the action as a matter of law on the basis of the admissions by plaintiff.

I did not discuss any of the above matters with Mr. Hughes and I do not believe it was discussed with Mr. Hughes by any of the officers of Toolco with whom I did discuss the matters.

Respectfully,

/s/ Chester C. Davis
Chester C. Davis

cc: J. Lee Rankin, Esq.
All Counsel

[fol. 27873]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CAHILL, GORDON, REINDEL & OHL
EIGHTY PINE STREET
NEW YORK 5, N. Y.

January 30, 1963

Re: *TWA* v. *Hughes, et al.*

Dear Judge Metzner:

This letter is submitted to Your Honor in connection with the letter of Chester C. Davis dated January 29th, a copy of which we received today. The statements made in that letter to Your Honor and in the annexed telegram, concerning what we now learn are nine boxes of withheld materials, are quite beside the point. The record before the Special Master on March 22, 1962 plainly shows that the Special Master merely ruled at that time that documents of the type described were not called for by Your Honor's earlier production order. The Special Master directed that the documents be preserved so as to be available in the event that a future order required their production. The Special Master's order of January 22, 1963 does in our opinion require the production of the material said to be in the boxes in question. See in this connection, items (a), (b), (i), (o), (p), (q), (r), (s), (u), (v) and (w) of that order.

It is equally clear, we believe, that the alleged difficulty of making a full production in response to the Special Master's order of January 22, 1963, is greatly overstated. Obviously, for example, certain items such as (v) and (w), can be produced in a matter of hours, if not minutes. Similarly, it is incredible that documents coming within items (c), (d) and (e) would not be found entirely, or almost entirely, in a single correspondence or memorandum file. The same applies to items (j), (k) and (l). Accordingly, we request that Your Honor direct the production forthwith of such items as these which are and should be promptly available, and direct that production be made hereafter on a day-to-day basis of such other documents as a good faith effort will produce, and that the production be completed prior [fol. 27874] to the commencement of the Hughes deposition on February 11, 1963, or, failing completion, that a written report be submitted by Hughes Tool Company of the extent of its efforts to comply and the extent to which compliance has by then been made.

In so far as the letter to Your Honor again requests an adjournment of the examination of Howard R. Hughes as a witness in this proceeding, we strongly oppose. TWA, in reliance on the orders which for over three months have established February 11th as the date for commencement of the Hughes deposition, has engaged hotel and office space and rented office equipment and is moving its personnel and files to Los Angeles early next week. As this Court knows, Chief Judge Hall has assigned a hearing room and Deputy Marshals are being appointed. I am also advised that the additional defendants similarly have already committed themselves to hotel and office space and to the expenditure of substantial amounts additionally in connection with office equipment.

Since the only ground advanced by Hughes Tool Company for its desire to postpone the Hughes deposition is its insistence that the Court first consider its motion to dismiss or for summary judgment, which it filed in August 1961, it must be recognized that this problem is one which is being created by the Hughes Tool Company itself. The motions which the Hughes Tool Company has made and which are to be supported by additional papers due February 1st, are clearly premature in any event, under the authority of decisions of the Supreme Court of the United States and of the Circuit Court of Appeals for the Second Circuit, and of this Court itself. Accordingly, in so far as Mr. Davis requests an extension of time within which to file any additional papers in support of his motion to dismiss and for summary judgment, TWA has no objection to whatever extension of time the Court wishes to give Hughes Tool Company in this connection, provided, of course, that TWA continues to have the right to file its papers in opposition one week after the filing by Hughes Tool Company of its papers and that no adjournment of the Hughes deposition is permitted.

Very truly yours,

/s/ John F. Sonnett
John F. Sonnett

Hon Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York 7, N. Y.

cc: Special Master
All Counsel

[fol. 27882]

In the United States District Court

Southern District of New York

United States District Court
United States Courthouse
Foley Square
New York 7, N. Y.

Chambers of
Charles M. Metzner
District Judge

January 30, 1963

Mr. Chester C. Davis
120 Broadway
New York 5, New York

Re: *TWA* v. *Hughes Tool Co.*

Dear Mr. Davis:

At 10 minutes to 7 last night you had delivered a letter addressed to me regarding the production of the so-called tax documents, and in addition requested an extension of time within which to file your papers on the motion to dismiss. The question of the production of the tax documents was raised very early in this month, and I see no reason to grant you additional time to submit papers on the appeal from the ruling of the Special Master.

Your request for additional time to submit papers in support of the motion to dismiss is denied. You filed this motion on August 9th, 1961, and have stated to the court that you were prepared to argue it shortly after the case was assigned for all purposes, which was on August 31st, 1961. Consequently, you have had over a year and a half to further think about the arguments that you were ready to advance in support of the motion. Furthermore, the Special Master, in granting an adjournment of the deposition of Howard Hughes from October 29th, 1962 to February 11th, 1963, indicated that the long adjournment was given to permit you sufficient time within which to make any necessary motions. However, it was not until January 14th that you requested the court to bring on for argument the motion filed on August 9th, 1961.

I notified you on January 16th of the time schedule for the submission of papers, and I also arranged for you to be relieved of any schedule for filing papers in the Delaware action between that time and February 1st, so that you would be free to prepare your papers on the motion to dismiss. It seems to me that over two weeks is sufficient time [fol. 27883] to put on paper the arguments in support of a motion that you made over a year and a half ago, and which you were ready to argue at that time.

Very truly yours,

/s/ Charles M. Metzner
Charles M. Metzner

cc: Mr. J. Lee Rankin
Mr. John F. Sonnett
Mr. Thomas D. Barr

[fol. 27887]

[Stamps—Copy—Received—C. G. R. & O.—Feb. 5, 1963—Referred to Mr. Sonnett]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHESTER C. DAVIS
120 BROADWAY
NEW YORK 5, N.Y.
DIGBY 9-0660

February 4, 1963

Re: *TWA* vs. *Hughes Tool Company, et al.*

J. Lee Rankin, Esq.
36 West 44th Street
New York 36, New York

Dear Mr. Rankin:

Referring to the order of Judge Metzner dated February 1, 1963 and our telephone conversation relating thereto, this is to confirm the following:

Friday evening, February 1, 1963, I requested Messrs. Andrews, Kurth, Campbell & Jones to forward to me immediately the nine boxes containing work papers which Toolco claims are not producible under your rulings and orders of the Court. The boxes have left Houston and as soon as I receive them, I will advise you promptly so that you may examine each document and rule thereon.

As I explained to you in our telephone conversation, Toolco is taking the action indicated above without prejudice to its position that at this time it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants. Rather than submit to further discovery on the record to date, Toolco reserves the right, if it becomes necessary to do so, to elect not to defend on the merits.

[fol. 27888] It is, of course, the expectation of Toolco that the disposition of its pending motion to dismiss will obviate the necessity of pursuing the matter further. In addition, in connection with the claims being asserted by Toolco against the additional defendants, you are referred to the motion of the additional defendants, returnable February

18, for an order dismissing said claims with prejudice, and to the letter of Toolco to Judge Metzner dated February 1, 1963.

Sincerely,
/s/ CHESTER C. DAVIS
Chester C. Davis

cc: All Counsel

[fol. 27889]

[Handwritten notation—Copy]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAHILL, GORDON, REINDEL & OHL
EIGHTY PINE STREET
NEW YORK 5, N. Y.

February 5, 1963

Re: *TWA* v. *Howard R. Hughes, et al.*

Dear Mr. Davis:

Reference is made to the provisions of the order of Judge Metzner dated February 1, 1963 which required among other things the day-to-day production of documents which were the subject of that order. None has been supplied to date.

We hereby request that you produce to us no later than 5:00 P.M. tomorrow for inspection and copying the 1961 and 1962 tax returns and financial statements of the Hughes Tool Company which have been ordered produced as described in subparagraphs (v) and (w) of the Special Master's opinion dated January 22, 1963.

Very truly yours,
/s/ JOHN F. SONNETT

Chester C. Davis, Esq.
120 Broadway
New York 5, New York

cc: Hon. Charles M. Metzner,
United States District Judge
Hon. J. Lee Rankin,
Special Master
All Counsel

[fol. 27890]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LETTERHEAD OF
CRAVATH, SWAINE & MOORE

February 6, 1963

TWA v. *Hughes*

Dear Mr. Davis:

We are in receipt of Mr. Sonnett's letter to you of February 5, 1963 concerning production of the confidential documents.

We join in the request that you produce to us for inspection and copying no later than 5:00 p.m. today at least the 1961 and 1962 tax returns and financial statements of the Hughes Tool Company which have been ordered produced as described in subparagraphs (v) and (w) in the Special Master's order dated January 22, 1963 and affirmed by the court by its order of February 1, 1963.

Very truly yours,

JOHN R. HUPPER

Chester C. Davis, Esq.,
120 Broadway,
New York 5, N. Y.

JJ

BY HAND

Copy to all counsel.

[Stamp—Received—C. G. R. & O.—Feb. 6, 1963—Referred to Mr. Sonnett]

[fol. 27891]

[Stamp—Copy]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHESTER C. DAVIS
120 BROADWAY
NEW YORK 5, N. Y.
DIGBY 9-0660

BY HAND February 8, 1963

Re: *TWA* vs. *Hughes Tool Company, et al.*

Hon. Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York, N.Y.

Dear Judge Metzner:

Referring to the suggestion of Your Honor on February 6, 1963, that it would be desirable for me to indicate as quickly as possible whether Toolco intended to proceed with the deposition in California on February 11th, I advised Mr. Rankin, and through him other counsel, yesterday morning that Toolco had elected to rest on the merits of its positions, that it had decided not to proceed with the deposition in California, and that therefore there would be no need for anyone to go to Los Angeles. Toolco reached that conclusion believing that it has no practical alternative and that the expenses it would incur, directly, and indirectly as a 78% owner of TWA, would exceed the amount of damages provable by plaintiff under the complaint.

I also advised Mr. Rankin that as soon as possible I would file a formal statement of Toolco's position to that effect. I intended to file the enclosed Notice of Position as part of [fol. 27892] a motion to the Court to be filed before 5:00 P.M. today. It now appears that it may not be possible for me to file the intended motion by that time. Therefore, I am furnishing Your Honor and other counsel with a copy of the Notice of Position at this time.

Respectfully,

/s/ Chester C. Davis
Chester C. Davis

Encl.
cc: J. Lee Rankin, Esq.
All Counsel
(With enclosure)

[fol. 27957]

[Stamp—Received—Apr. 30, 1962—Chester C. Davis]

In the United States District Court
Southern District of New York

J. Lee Rankin
36 West 44th Street
New York 36, New York

MUrray Hill 7-2924

BY HAND

April 30th, 1962

Chester C. Davis, Esq.
120 Broadway
New York 5, New York

Re: *TWA* vs. *Hughes Tool Company, et al.*

Dear Mr. Davis:

I received your letter of April 27, 1962 in the above entitled matter on Friday of last week too late in the afternoon to be able to respond to it during that week. Your interpretation of my opinion of April 17, 1962 is accurate in so far as it states that the Special Master determined that "when an attorney acts as a business negotiator, reports of his negotiations or dealings in that capacity are not privileged" and—"the privilege does not attach to facts witnessed by an attorney or learned while participating in negotiations and that if he is called to testify, his testimony in that area must be complete and is not subject to the claim of privilege as to any such facts."

Your interpretation however fails to recognize the effect of the decision concerning waivers that have occurred by Toolco by reason of the affidavit of Raymond Cook referred to in the opinion and the pleading of reliance upon the advice of counsel by Toolco as legal justification for some of Toolco acts.

The holding of the opinion is that there was a legal waiver by Toolco as to all communications purporting to set forth facts in whole or in part on any of the subjects covered in the affidavits sworn to by Raymond Cook on November 22, 1961 and filed in the proceeding before the CAB called Toolco-Northeast Control Case, Docket No. 11620. Such waiver would also include all disclosures and all communications which would otherwise be privileged because of an attorney and client relationship which occurred in those proceedings.

The opinion also decided that Toolco by its pleading of justifiable reliance on the advice of counsel with regard to certain of its acts placed in issue what that advice was, and any facts which counsel had or were given when they ren- [fol. 27958] dered such legal advice. Thus it was decided in such opinion that there was a complete waiver concerning all legal advice and factual information obtained in connection with such advice, given by Mr. Raymond Cook, Mr. Chester C. Davis or Mr. Bautzer or any other legal counsel however known as "outside" or otherwise for the entire period after 1960.

The decision also held that the various parties to the proceedings were entitled to the production of such documentary evidence under their Rule 34 motions in so far as it was under the legal control of Toolco at once.

Concerning the limited interrogatories that TWA asked to be permitted to serve upon persons connected with Toolco, it was my purpose on April 17th to authorize such interrogatories to be served so that TWA might as promptly as possible and without incurring additional substantial expense, learn the present location of Howard R. Hughes. When I fixed a time for appeal from the order authorizing such interrogatories to be served, no question was raised by counsel for Toolco as to whether Toolco should have an opportunity at some later date to appeal from such interrogatories after they were served. However, in order that there be no technical issue as to when there is a final order from which an appeal may be taken, I hereby authorize TWA to serve such interrogatories forthwith, and do now allow Toolco two (2) days after the service of such interrogatories within which to file with me any objections that Toolco may have for any reason to said interrogatories.

Very truly yours,

/s/ J. Lee Rankin
J. Lee Rankin

JLR:hst
CC: All Counsel

[fol. 27959]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 28406

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellee,*

—against—

HOWARD R. HUGHES and RAYMOND M. HOLLIDAY,

Defendants,

—and—

HUGHES TOOL COMPANY, *Defendant-Appellant,*

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO. INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR.,

Additional Defendants-Appellees,

—and—

ERNEST R. BREECH, *Additional Defendant.*

BRIEF OF DEFENDANT-APPELLANT HUGHES TOOL COMPANY —Filed September 9, 1963

The answer denied that Toolco had engaged in conduct in violation of the antitrust laws. In addition, the counterclaims set up facts which establish that any injury TWA may have suffered in connection with its acquisition and financing of aircraft, particularly jet aircraft, was the result of unlawful conduct on the part of the additional defendants, and not as a result of any conduct by Toolco. In effect, the facts asserted in the counterclaims constitute affirmative defenses to the allegations of the complaint.

[fol. 27960]

In the United States Court of Appeals
For the Second Circuit

Nos. 150-1—September Term, 1963.

(Argued November 13, 1963 Decided June 2, 1964.)

Docket Nos. 28405-6

Trans World Airlines, Inc., Plaintiff-Appellee,

—v.—

Howard R. Hughes, Defendant,

—and—

Hughes Tool Company and Raymond M. Holliday,
Defendants-Appellants.

Trans World Airlines, Inc., Plaintiff-Appellee,

—v.—

Howard R. Hughes and Raymond M. Holliday,
Defendants,

—and—

Hughes Tool Company, Defendant-Appellant,

[fol. 27961]

—and—

The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Dillon, Read & Co., Inc., Ben-Fleming Sessel, James F. Oates, Jr., Harry C. Hagerty and Charles C. Tillinghast, Jr., Additional Defendants-Appellees,

—and—

Ernest R. Breech, Additional Defendant.

Before: LUMBARD, Chief Judge, KAUFMAN and HAYS, Circuit Judges.

OPINION—June 2, 1964

Docket No. 28405

Interlocutory appeal, under 28 U. S. C. §1292(b), from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, which granted default judgment in favor of the plaintiff because of the defendants' failure to produce the managing agent of one defendant for examination and their failure to produce certain papers and documents. 32 F. R. D. 604 (S. D. N. Y. 1963).

Pursuant to an order of this court of June 6, 1963, the appeal is limited to two questions: (1) Whether the district court had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the antitrust claims of the plaintiff.

[fol. 27962] The court finds that the district court had jurisdiction of the action and that the CAB orders do not constitute a good defense to the antitrust claims of the plaintiff.

Docket No. 28406

Appeal from orders of the United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, which dismissed with prejudice the defendants' first five counterclaims and which granted summary judgment in favor of the plaintiff on the sixth counterclaim, because of the defendants' failure to produce the managing agent of one defendant for examination and their failure to produce certain papers and documents.

Affirmed with respect to all but the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

John F. Sonnett, New York, N. Y. (Jerrold G. Van Cise, Paul W. Williams, Dudley B. Tenney, Raymond L. Falls, Jr., and William T. Lifland, Cahill, Gordon, Reindel & Ohl, New York, N. Y., on the brief), for plaintiff-appellee Trans World Airlines, Inc.

Chester C. Davis, New York, N. Y., for defendants-appellants Hughes Tool Company and Raymond M. Holliday.

Bruce Bromley, New York, N. Y. (Cravath, Swaine & Moore, New York, N. Y., on the brief), for additional defendants-appellees The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty.

[fol. 27963] William C. Chanler, New York, N. Y. (Winthrop, Stimson, Putnam & Roberts, New York, N. Y., on the brief), for additional defendants-appellees Irving Trust Company and Ben-Fleming Sessel.

Charles L. Stewart, New York, N. Y. (Dunnington, Bartholow & Miller, New York, N. Y., on the brief), for additional defendant-appellee, Dillon, Read & Co.

Chadbourne, Parke, Whiteside & Wolff, New York, N. Y., for additional defendant-appellee Charles C. Tillinghast, Jr.

LUMBARD, Chief Judge:

These separate appeals, heard together, are from two orders of the United States District Court for the Southern District of New York in the same case. In the first appeal, No. 28405, the defendants, Hughes Tool Company (Toolco) and Raymond M. Holliday, Toolco's chief financial officer, attack the validity of an order which granted default judgment in favor of the plaintiff, Trans World Airlines, Inc., because of the defendants' failure to produce Toolco's managing agent, Howard R. Hughes, for examination and their failure to produce certain papers and documents. 32 F. R. D. 604 (S. D. N. Y. 1963). In the second appeal, No. 28406, Toolco attacks an order which dismissed with prejudice its first five counterclaims against TWA and a group of additional defendants and an order of the same date which granted summary judgment in favor of TWA on the sixth counterclaim.

TWA's complaint charged the defendants with a variety of violations of the antitrust laws as well as with having committed willful and malicious injury to TWA's business, [fol. 27964] and sought divestiture of Toolco's interest in TWA, injunctive relief; and money damages, trebled with respect to the antitrust violations. On May 3, 1963, Judge Metzner ordered the entering of a default judgment in favor of TWA against Toolco[1] but referred to a special master the issue of damages, on TWA's claim of $35,000,000 which the antitrust statute would treble, and retained for further consideration the question of divestiture. Judge Metzner did certify under 28 U. S. C. §1292(b) that immediate appeal was justified inasmuch as a controlling question of law was involved and hearings on the question of damages might be prolonged. We granted leave to appeal limited to two questions: first, whether the district court lacked jurisdiction over these matters residing in the Civil Aeronautics Board; and second, whether the issuance of certain orders by the CAB permitting the defendant to take certain actions constitutes a good defense to the antitrust action. Thus the propriety of the court's entering a default judgment against the defendants with respect to the complaint is not before us and we consider it only in connection with the court's dismissal of the five counterclaims asserted by the defendants. The second appeal is taken as of right from a final judgment which dismissed Toolco's first five counterclaims and granted summary judgment to TWA on the sixth counterclaim.

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[1] Due to the relationship of the parties, the district court accepted the election of defendant Holliday, an officer and director of Toolco, to be bound by Toolco's decision to forego discovery proceedings.

BACKGROUND OF THE LITIGATION

An understanding of the issues requires a preliminary statement of certain background facts set forth in the pleadings and which on this record and in view of the default of the defendants we must take as established.

[fol. 27965] Commencing about five years after TWA was organized in 1934, Toolco, which at all times has been 100 percent owned and controlled by Howard Hughes, began to purchase TWA common stock, and by 1944 it held 45 percent of this stock. By 1958 Toolco had increased to 78 percent its interest in TWA's common stock; from 1944 until December 1960 it nominated a majority of TWA's directors.

Since 1955 the commercial air industry has largely converted to the use of jet aircraft. TWA's competitors began in that year to aid in the development of and to purchase jet planes. Prior to 1955 Toolco had entered into an arrangement with the General Dynamics Corporation (Convair) for the joint development of jet aircraft, but in that year the two companies terminated the arrangement. Toolco had also entered into a plan whereby it would develop and manufacture its own jet aircraft for sale or lease to TWA and its competitors. That plan was abandoned during 1956. During this period, Toolco arranged for the purchase on its own account of jet aircraft from Convair and the Boeing Company, these arrangements providing that Toolco could assign to TWA its rights to such aircraft.

Despite repeated requests by TWA, Toolco refused to assign any planes to TWA during the period 1956 to 1960. The only jet-powered aircraft which the defendants permitted TWA to use during this period were leased on a day-to-day basis by Toolco to TWA during 1959 and 1960 on the condition that TWA would not purchase or lease aircraft from any other potential supplier.

At some time prior to May 1960 Toolco and Atlas Corporation, which owns a controlling stock interest in Northeast Airlines, entered upon a plan to have Northeast propose to TWA a merger of the two air carriers. In November 1960, while the proposed merger plan was pending, Toolco diverted to Northeast six of the Convair jet aircraft which by previous agreement it had assigned to TWA.

[fol. 27966] The defendants pursued a continuous policy of refusing to permit TWA to undertake equity financing except on the condition that Toolco increase its equity position in TWA; as a result TWA was limited to obtaining funds through debt financing. When in 1960 Toolco and Hughes finally agreed to outside financing for TWA, the cost of such financing had risen greatly and the financing could be arranged only on less favorable terms than had theretofore been available, terms which had been secured by TWA's competitors. Under the 1960 financing arrangement Toolco's stock in TWA was placed in a voting trust.[1a] The CAB approved this financing arrangement and the voting trust on December 29, 1960, finding that these arrangements were in the public interest. Thereupon, the Metropolitan Life Insurance Company and the Equitable Life Assurance Society loaned TWA $92,800,000 and a group of banks for which the Irving Trust Company acted as agent loaned TWA $72,000,000. In March 1961 TWA's Board of Directors authorized the purchase of 26 Boeing jet aircraft. Thereafter the defendants continued their attempts to have TWA purchase from Toolco jet aircraft which Toolco had previously agreed to purchase from Convair. The defendants have also continued to press their demand for a merger of TWA and Northeast and have otherwise, despite the existence of the voting trust, attempted to prevent TWA from acquiring jet aircraft other than from Toolco.

[fol. 27967]

THE FIRST APPEAL—Docket No. 28405

TWA's complaint alleges that the facts heretofore stated constitute violations of the Sherman and Clayton antitrust acts, insofar as the defendants have attempted to monopo-

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[1a] The commitments of the various lending institutions had been conditioned upon the continuation of satisfactory TWA management. The lenders reserved the right to insist upon a voting trust during the term of the loan in the event of a change in TWA management which they deemed to be adverse to TWA's credit position. When Charles Thomas abruptly resigned as president of TWA in July 1960 the lenders offered to effect the transaction if Toolco agreed to place its stock in TWA in a voting trust. In December 1960 Toolco executed the voting trust agreement.

lize a substantial segment of interstate and foreign commerce and trade, have required that TWA boycott all suppliers of aircraft other than Toolco, and have agreed to provide financing and to sell aircraft to TWA on the condition that TWA not purchase or lease the goods of a competitor. The defendants assert that the Civil Aeronautics Board possesses primary jurisdiction over these matters and in the exercise of its powers has approved all of the transactions alleged in the complaint and thereby immunized the defendants from the operation of the antitrust laws. Judge Metzner held that nothing in the Federal Aviation Act precludes the district court from asserting jurisdiction in this case and that the CAB's approval of various transactions between TWA and Toolco did not confer immunity upon the defendants from the operation of the antitrust laws. We agree.

The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945). Yet Congress may effect such a design through explicit enactment of an immunizing provision, and Congress has done so on occasion.[2] Under §408(a)(6) of the Federal Aviation Act, 49 U. S. C. §1378(a)(6), no person engaged in any phase of aeronau- [fol. 27968] tics[3] may lawfully acquire control of any air carrier without the prior approval of the CAB. Section 411 empowers the Board to order any air carrier to cease and desist from "unfair or deceptive practices or unfair methods of competition." Section 414 of the Act provides that any person affected by any order made under §408[4] "shall be, and is hereby, relieved from the operation of the 'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

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[2] See, e.g., Clayton Act §16, 38 Stat. 737 (1914), as amended, 15 U. S. C. §26 (1958); Shipping Act §15, 39 Stat. 734 (1916), 46 U. S. C. §814 (1958); Interstate Commerce Act §5a(9), 62 Stat. 473 (1948), 49 U. S. C. §5b(9) (1958).

[3] In *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C. A. B. 153 (1944), the Board determined that Toolco was engaged in a phase of aeronautics and thus subject to Board action under §408.

[4] Section 414 applies to 49 U. S. C. §1379 (interlocking relationships) and 49 U. S. C. §1382 (pooling and other agreements) as well as to §408.

In attempting to ascertain the extent of the antitrust immunity conferred by the Aviation Act we do not explore wholly uncharted territory. In *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963) (*Panagra*), a case upon which all parties in this litigation principally rely, the Supreme Court considered the extent to which the Aviation Act has granted the CAB jurisdiction over matters involving the commercial aviation industry which might otherwise constitute antitrust violations.

Pan American, a major airline in interstate and foreign commerce, and W. R. Grace & Co., a common carrier, were charged in a civil action brought by the United States with violations of the antitrust laws arising from their relations with Panagra, an airline which had been formed by Pan American and Grace, each of which owned 50 percent of its stock. The government's complaint alleged restraints of trade in that Pan American and Grace had agreed that Panagra would have the exclusive right to traffic along the [fol. 27969] west coast of South America free of Pan American competition and that Pan American would enjoy the exclusive right to traffic in other areas in South America and between the Canal Zone and the United States; that Pan American and Grace had conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the United States and western coastal areas of South America and Buenos Aires; and that Pan American had exercised its 50 percent control over Panagra to prevent it from securing authority from the CAB to extend its service from the Canal Zone to the United States.

The district court found a single violation in Pan American's activities with regard to the extension of Panagra's routes and ordered divestiture of Pan American's stock interest in Panagra. On direct appeal from the district court, the Supreme Court reversed the lower court judgment on the ground that the questions presented by the government's complaint had been entrusted to the CAB and the district court therefore lacked jurisdiction in the premises.

Noting that those aspects of antitrust problems entrusted to the Board are "but a fraction of the total," the Court emphasized that the limitation of routes, the division of territories, and the relation of common carriers to air carriers are "basic to [the] . . . regulatory scheme" of the Federal Aviation Act and that the acts charged in the government's complaint are "precise ingredients of the Board's authority." The term "unfair methods of competition" in §411, the Court noted, must gather meaning from the context of the regulatory scheme envisioned in the Act, and it would be strange if the "public interest" standard incorporated into §411[5] was deemed satisfied by the Board [fol. 27970] as to a particular transaction and yet that transaction was violative of the antitrust laws; it would be equally strange for a transaction approved under §408 by the Board to be adjudged subsequently to be in violation of the antitrust laws.

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[5] Title 49 U. S. C. §1302 provides:

> "In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> "(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> "(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> "(e) The promotion of safety in air commerce; and
>
> "(f) The promotion, encouragement, and development of civil aeronautics."

The striking dissimilarities between the operative facts in *Panagra* and those in the instant case as well as the whole tenor of the Supreme Court's opinion compel us to the conclusion that the district court properly asserted jurisdiction in this cause. The relationship between the allegedly unlawful activities in *Panagra* and the scope of the Board's powers to deal with such activities was direct. Under 49 U. S. C. §1371, it is the specific function of the CAB to certify airlines to operate on a particular route between terminal points directed by the Board. The unlawful division of territories and allocation of routes with [fol. 27971] which Pan American, Grace and Panagra were accused were therefore directly within the ambit of powers explicitly granted the Board by the Congress. To permit the courts to intrude into this area would have been, as the Court noted, to permit the erection of an independent yet parallel body of law in direct contravention of the regulatory scheme embodied in the Aviation Act.

By contrast, in the instant case TWA's complaint alleges transactions which are unrelated to any specific function of the CAB. The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter. Thus the plaintiff's complaint enumerates a variety of transactions over which the Board is given no explicit jurisdiction by the Act: an attempt to monopolize a substantial segment of interstate and foreign air commerce, imposition by the defendants on TWA of the condition that the airline not purchase or lease aircraft from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with the purchase of such aircraft from Toolco.

Nowhere in the Act is the Board specifically charged with the duty of monitoring each transaction which is ultimately effected between the carrier and its controller once an acquisition is approved. The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable, and thereby [fol. 27972] retain a continuing jurisdiction over the activities of the controlling party.[6] In the exercise of this supplementary power the Board may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB. The issue here is not whether the CAB may consider such matters but rather whether the federal courts have been excluded from their consideration by Congress. There is virtually no limit to the nature and variety of the transactions which fall within this category. In the absence of an explicit congressional mandate entrusting such transactions exclusively to the Board we can find no basis for declaring the federal courts to be without jurisdiction in such matters.

In *Panagra* the Civil Aeronautics Board could have considered the activities of Pan American under its broad power set out in §411 of the Act to "investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation . . . ," a provision to which the Supreme Court explicitly adverted in holding that the matters there in dispute had been specifically entrusted by Congress to the Board By contrast, the Board enjoys no [fol. 27973] such power to deal with the allegedly unlawful activities of Hughes and Toolco, inasmuch as §411 is applicable solely to "any air carrier, foreign air carrier, or ticket agent." The limited applicability of §411 merely underscores the limited jurisdiction conferred by Congress upon the Board to deal with the multifarious antitrust problems which may arise in the management and operation of the commercial air industry. Moreover, it is not even clear that the Board any longer possesses any jurisdiction over the activities of Hughes and Toolco, even under §408 of the Act, inasmuch as the voting trust arrangement adopted in 1960 appears to have ousted Hughes and Toolco from control over the operations of TWA, such control being a prerequisite to the Board's acting under §408.

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[6] Section 408 provides, in pertinent part:

> "Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . . "

We are reinforced in our conclusion by the Supreme Court's recognition of the limitations of its holding in *Panagra*. Characterizing the questions presented in the government's complaint as "narrow" ones, the Court, as we have noted, emphasized that the antitrust problems entrusted by the Act of the Board "encompass only a fraction of the total." The activities here drawn into issue by TWA's complaint fall without the ambit of that small fraction of antitrust problems placed within the Board's exclusive jurisdiction.

The Aviation Act itself bears testimony that matters such as those with which we are here concerned were not intended to be placed without the competence of the federal judiciary. Title 49 U. S. C. §1506 declares that "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Moreover, the Act fails to empower the Board to grant the very relief principally sought by the plaintiff in this action—the award of money damages, trebled under the mandate of the antitrust laws.

[fol. 27974] Even if we were to view as a subject of judicial discretion the question whether the CAB is to be given primary jurisdiction in the consideration of activities such as those here alleged, we could find no compelling reason to adopt such a course on the facts presented. While the entire regulatory scheme of the Federal Aviation Act demands that the Board be given great latitude in fashioning public policy with regard to the development of the commercial air industry through the acquisition of control over air carriers—and the Board possesses a substantial expertise in these matters—there is no such necessity for a uniformity of policy with regard to the consideration of the validity of individual transactions effected between an air carrier and its controller which are alleged to be unlawful under the antitrust laws. Nor is the Board any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems. The disposition of such matters by the courts would not intrude upon the Board's function of fashioning the broad framework of control for the commercial air industry. We can thus find no warrant for adopting the position that the subject matter of this litigation was entrusted by Congress to the exclusive jurisdiction of the Civil Aeronautics Board.

Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions. Title 49 U. S. C. §1384 extends such immunity only "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." As Judge Metzner noted, the Board's approval of acquisition of control by Toolco over TWA did not carry with it approval of every transaction [fol. 27975] which Toolco might choose to effect in the exercise of its control. To give §408 such a carte blanche effect would be to pervert the entire regulatory structure of the Aviation Act. Nor can any of the activities with which Toolco stands charged be deemed to have been necessary to the exercise of its control relationship.

In its original grant of approval of the acquisition of control over TWA by Toolco,[7] the Board restricted commercial transactions between the two companies to "transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000." Over the years the Board has occasionally modified this order to permit specific intercompany transactions. In 1959 and 1960 the Board issued five such modification orders approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation. In each case, however, the Board's order states merely the specific terms of the transaction and none of the accompanying conditions which allegedly were foisted upon TWA.[8] Order No. E-13873, issued on May 15, 1959, for example, states that the modification "is desired to permit TWA to lease on an individual basis up to eleven Boeing 707-131 aircraft from Hughes as they become available, as well as to acquire from Hughes at Hughes' actual cost a supply of spare parts, not to exceed $3,500,000 in value, which are needed for the operation of these aircraft. In addition, modification is requested to permit the lease by Hughes of up to thirty spare [fol. 27976] jet engines to TWA." The Board stated in its order that the proposed arrangements did not violate the purpose of the original restriction in the control approval and that the modification ordered was just and reasonable and in the public interest; but the Board was careful to emphasize that its action should not be deemed a determination for rate-making purposes of the reasonableness of the transactions. There is no indication whatsoever—or any reason to believe—that the Board had been given any indication of the conditions which had been attached to Toolco's agreements with TWA. The Board's approval extended only to the individual transactions involved in these orders, not to the whole range of activities which over a period of years constituted the backdrop against which these transactions were effected. There is thus no cause to hold that these individual and narrow Board orders immunized the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board.

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[7] *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C. A. B. 153 (1944).

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[8] See Order No. E-13542, February 26, 1959; Order No. E-13873, May 15, 1959; Order No. E-14169, July 1, 1959; Order No. E-14504, September 30, 1959; Order No. E-14877, January 29, 1960.

The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of antitrust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the antitrust laws. We do not agree. We cannot say that the specific transactions alleged in TWA's complaint—that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco; that Toolco required TWA generally to boycott all other suppliers of aircraft; that the defendants have attempted through various means to monopolize a substantial segment of interstate and foreign air commerce—are on their face insufficient to support a claim of antitrust violations, a claim which surely falls [fol. 27977] within the jurisdiction of the district court. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendant denied the plaintiff the right through pre-trial discovery to add more detail and substance to the allegations set forth in the complaint. "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). See *Dioguardi* v. *Durning*, 139 F. 2d 774 (2 Cir. 1944); *Knudsen* v. *Torrington Co.*, 254 F. 2d 283 (2 Cir. 1958). Of course the Federal Rules apply with equal force to suits under the antitrust laws. *Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 322-23 (2 Cir.

1957). We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction.

THE SECOND APPEAL—Docket No. 28406

The defendants also appeal, as of right, from orders of the district court which dismissed with prejudice their first five counterclaims asserted against TWA and a group of additional defendants and which granted summary judgment in favor of TWA on a sixth counterclaim, because of the defendants' failure to produce Hughes for examination and their failure to produce certain papers and documents. The additional defendants are the three major lending institutions which participated in the 1960 financing and voting [fol. 27978] trust agreements, certain of their officers, the incumbent president and chairman of the board of directors of TWA, and an investment banking concern which since early in 1959 has served as TWA's principal financial adviser.

The proper consideration of this appeal requires a chronological exposition of the lengthy and complicated pretrial proceedings engaged in by the parties. Late in 1961 Judge Metzner was assigned to serve as a judge for all purposes in this litigation under General Rule 2, General Rules of the United States District Courts for the Southern and Eastern Districts of New York. By order of February 7, 1962, Judge Metzner confirmed a series of prior orders which had awarded Toolco priority in the conduct of pretrial discovery, and he then appointed J. Lee Rankin, Esq. as Special Master to supervise the conduct of the discovery proceedings.

Shortly after the filing of the answer and counterclaims on February 12, the Special Master granted Toolco's motions to have the additional defendants produce a multitude of documents. On March 5, Judge Metzner modified the February 7 order so as to limit Toolco's priority in discovery to evidence which bore on the plaintiff's claims against Toolco. The March 5 order stated that "The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions." The court further ordered that upon the completion of the additional defendants' deposition proceedings Toolco could complete its own deposition proceedings.

On February 16, the Special Master had granted the motion of the additional defendants for the production of certain documents by Toolco. Toolco withheld certain of these documents on a claim of attorney-client privilege. After full consideration, the Special Master ordered the [fol. 27979] production of these documents on April 17. After affirmance by the district court of this order and of a second order to produce issued by the Special Master, and denial of review by this court, counsel for Toolco, in a letter to Judge Metzner on January 23, 1963, declared that Toolco would refuse to comply with any of these orders.

Meanwhile, on September 6, 1962, counsel for Toolco had accepted a subpoena calling for Hughes' personal appearance as a witness returnable on September 24, 1962. The district court later set October 29 as the date for the Hughes deposition. The court went on to adopt as its own a prior decision of the Master that in view of the close connection between Hughes and Toolco, Toolco would be responsible for Hughes' actions with respect to the subpoena, and that if Hughes failed to communicate with the Special Master he would be deemed to have acquiesced in this interpretation. No communication from Hughes was received by the Master.

On October 25, 1962, the Master granted Toolco's motion to adjourn the Hughes deposition, but set February 11, 1963, as a firm date therefor. By order of January 10, 1963, the district court affirmed the setting of this date, stating that "this date will be adhered to in the absence of extraordinary circumstances." Shortly thereafter, Toolco moved to hold the Hughes deposition on written interrogatories and to bring on for hearing its motion, pending since August 8, 1961, to dismiss the complaint for failure to state a claim upon which relief may be granted. On January 19, 1963, the district court denied the first motion.

In preparation for the Hughes deposition, the additional defendants had moved on January 9, 1963, for the production by Toolco of certain income tax returns, revenue agents' reports, accountants' work sheets and other documents which would allegedly substantiate a claim that Toolco and Hughes had been motivated by a desire to reap [fol. 27980] tax benefits at TWA's expense in their dealings with TWA concerning the acquisition of a jet-powered fleet of aircraft. On January 22, 1963, the Master ruled that the documents were relevant to the issues in the case and that their production would not place an unreasonable burden upon Toolco. On February 1, the district court affirmed the order to produce, but Toolco failed to produce the documents, despite repeated demands by TWA and the additional defendants.

On February 6, 1963, five days before the scheduled Hughes deposition, Toolco filed a complaint with the Civil Aeronautics Board charging the additional defendants with violations of the Federal Aviation Act. On the same day Toolco moved the district court for a stay of all proceedings on the counterclaims pending disposition by the CAB of the Toolco complaint, on the ground that under the Supreme Court's decision in *Panagra,* filed on January 14, 1963, the Board possessed exclusive jurisdiction over the subject matter of the counterclaims. On February 6 the district court denied Toolco's motion to dismiss the complaint, 214 F. Supp. 106 (S. D. N. Y. 1963), and on February 8 it denied Toolco's motion for a stay of all proceedings on the counterclaims.

On February 8 counsel for Toolco informed the district court that Toolco had made a "business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. Consequently, counsel for Toolco stated, Hughes would fail to appear for the deposition ordered for February 11. He further stated that Toolco was aware of the sanctions which could be imposed by the district court for such a willful and deliberate failure to proceed with the scheduled discovery proceedings.

The inevitable consequence of Toolco's default in producing Hughes as a witness and in producing the documents [fol. 27981] as the court had directed was that on May 3 the district court granted the motions of TWA and the additional defendants for dismissal of the counterclaims with prejudice, under Rule 37(b)(2)(iii) and Rule 37(d) of the Federal Rules of Civil Procedure. From the final judgments entered pursuant to that decision, and from a final judgment entered the same day granting TWA's motion for summary judgment on the sixth counterclaim, Toolco appeals.

Inasmuch as the sixth counterclaim raises issues unrelated to the first five counterclaims, we shall treat the sixth counterclaim separately.

The First Five Counterclaims

The appellants raise several contentions: first, that the district court should have granted their motion for a stay of all proceedings on the counterclaims pending disposition of the complaint which the defendants had filed with the CAB; second, that the district court should have granted the defendants a voluntary dismissal of the counterclaims without prejudice; and third, that the district court orders which directed Hughes to appear for deposition as noticed by the additional defendants, and which directed Toolco to produce the tax documents and the documents involving the attorney-client privilege, were improper.

That there was no cause for granting a stay of all proceedings on the counterclaims appears clear from the nature of these counterclaims. The first counterclaim alleges that the additional defendants and the present management of TWA improperly sought to perpetuate their control over TWA by preventing termination of the voting trust according to its terms. The second charges that Metropolitan and Equitable had acquired control over TWA in violation of §408 of the Aviation Act. The third [fol. 27982] counterclaim is brought derivatively on behalf of TWA and asserts that the additional defendants and the present TWA management have conspired in violation of the anti-trust laws to monopolize the supplying of financing to air carriers. The fourth restates the allegations of the third counterclaim and alleges that Toolco has suffered damages in excess of $77,000,000. Finally, the fifth counterclaim charges a common law conspiracy to interfere with Toolco's rights as the owner of 78 percent of the stock of TWA and to extend the duration of the voting trust beyond the period permitted by the applicable Delaware statute.

In the light of the views we have above expressed regarding the first appeal, it is plain that all of these counterclaims save the second fall beyond the scope of the CAB's exclusive jurisdiction. They deal with alleged misconduct on the part of the lending institutions in their dealings with TWA and Toolco and in no respect with matters specifically entrusted to the Board in the Act. Acts such as those alleged in all but the second counterclaim may properly be made the subject of an action in a federal district court. Inasmuch as the Board possessed no exclusive jurisdiction as to these claims, the defendants presented no adequate basis for a stay of proceedings.

As for the second counterclaim—which alleges a violation by the additional defendants of §408 of the Aviation Act—the Board clearly possesses exclusive jurisdiction. Under that section, the Board is empowered to investigate alleged violations, and the district court was without power to adjudicate this issue. The court should have dismissed this counterclaim for lack of jurisdiction, and we direct the modification of the judgment below accordingly.

The defendants maintain that the district court should have granted a voluntary dismissal without prejudice of the counterclaims. It suffices merely to note that at no juncture in the proceedings below did the defendants re- [fol. 27983] quest that the court grant such relief. Indeed, the very purpose for the defendants' "business decision" to terminate all pre-trial discovery was to gain judicial review of the positions which the defendants had taken below.

Finally, the defendants contend that the district court's dismissal with prejudice of the counterclaims was invalid because the discovery orders upon which the district court based its order under Rules 37(b)(2)(iii)[9] and 37(d)[10] were improper.

We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation, and his willful and deliberate default constituted a sufficient basis under Rule 37 for the dismissal of the counterclaims with prejudice. Hughes has at all times been the sole [fol. 27984] owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes. Although the defendants contend that the February 11, 1963 deposition was to be held solely for the benefit of TWA, Judge Metzner's order of February 7, 1962 made clear that the additional defendants could schedule separate deposition proceedings of their own, or in the alternative participate in TWA's deposition proceedings. On February 14, 1962, the additional defendants served notices to examine Toolco by Hughes, its managing agent. The additional defendants had the right under Judge Metzner's order to treat as their own the Hughes deposition scheduled for February 11, and it is abundantly clear from the record that they did so.

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[9] Rule 37 provides:

"(b) Failure to Comply With Order.

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . ."

[10] Rule 37 provides:

"(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional defendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. See *Nasser* v. *Isthmian Lines*, 2d Cir., Docket No. 28591, April 6, 1964; *Link* v. *Wabash Railroad Co.*, 370 U. S. 626 (1962); *Gill* v. *Stolow*, 240 F. 2d 669 (2 Cir. 1957).

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon [fol. 27985] every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a "business decision" to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. See Handbook of Recommended Procedure for the Trial of Protracted Cases, Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F. R. D. 351 et seq. (1960).

In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year.

We are also of the view that the other two discovery orders were properly issued. After careful examination of the documents, both the Special Master and the district [fol. 27986] court determined that the attorney-client privilege claimed by the defendants as to the first group of documents had been waived as the result of the defendants' pleading advice of counsel as a defense and as the result of two affidavits, one of which was submitted to the CAB by Raymond A. Cook, one of Toolco's attorneys. As the Master noted, the Cook affidavit purports to be based upon information received by Cook as Attorney for Tooleo and in many respects parallels the allegations made in the answer and counterclaims. The district court properly held that under these circumstances the affidavit constituted a waiver by Toolco of the attorney-client privilege. As for the documents concerning income tax information, there can be little question of the relevance of this material to the litigation. The additional defendants might well have based a defense to the counterclaims upon a showing that

Toolco's and Hughes' activities with regard to the financing of aircraft acquisitions by TWA were motivated by a desire to reap income tax benefits for Hughes at the expense of TWA. Of course, the test of relevance for discovery purposes is less stringent than that applied to the admissibility of evidence at trial. Moore, Federal Practice ¶34.10. The district court properly ordered the production of the tax documents.

The Sixth Counterclaim

The December 1, 1960 financing agreement required the subordination of prior indebtedness of TWA to Toolco, to be achieved through the issuance by TWA of interim subordinated notes in payment *pro tanto* of the prior indebtedness. TWA was then obliged to offer to its stockholders the right to purchase, at least at par, $100 million worth of subordinated debentures. The interest on both the interim notes and the debentures was set at 6½ percent. [fol. 27987] Toolco agreed to purchase the "principal amount" of the unsubscribed debentures within three business days of the close of the subscription offering. The agreement further provided that "TWA shall . . . refund the Interim Subordinated Notes . . . upon the purchase by Hughes [Toolco] of [the] Subordinated Debentures . . . and Hughes shall accept such Subordinated Debentures in any such refunding of the Interim Subordinated Notes up to the aggregate principal amount of Subordinated Debentures which Hughes is so obligated to purchase." The transaction was to be completed by TWA's turning over to Toolco the cash received from the subscription offering in addition to accrued and unpaid interest on the interim notes to the date of refunding.

The subscription offering expired on June 8, 1961. On June 13, three business days thereafter, TWA delivered to Toolco some $19 million in cash received in the offering and nearly $81 million in unsubscribed debentures, totalling $100 million, the amount of the interim notes. TWA also paid Toolco interest on the $100 million to June 8 and interest on the $19 million through June 12. TWA paid no interest on the $81 million from June 8 through June

12 on the ground that it was substituting interest-bearing debentures for the interim notes.

In its sixth counterclaim, Toolco contends that under the terms of the financing agreement, TWA was obliged to pay interest on the interim notes to the date of refunding, June 13, and that TWA's failure to pay such interest resulted in Toolco's paying more than par value for the subordinated debentures, in violation of the terms of the agreement. We agree with Judge Metzner who found that "based on the overall arrangements between the parties, . . . it was their intention to substitute the debentures for the interim notes and that payment of double interest for the five days was not the intendment of the parties." The [fol. 27988] fact that the subordinated debentures were issued as of June 8 and bore interest from that date, in the same amount as the interim notes, indicates that the exchange for the notes was to be effective as of that date. The provision for having the closing three business days thereafter was merely to afford time for the preparation for that transaction. The most plausible reading of the financing agreement would seem to be one which eliminates the double interest for the period between June 8 and June 13 which Toolco now seeks. Judge Metzner properly granted summary judgment to TWA on this counterclaim.

CONCLUSION

As to the first appeal, we find that the district court had jurisdiction of the action and that the Civil Aeronautics Board orders do not constitute a good defense to the antitrust claim of the plaintiff.

The orders of the district court in the second appeal are affirmed with the exception of the order dealing with the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

[fol. 27989]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28405

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Circuit Judges.

TRANS WORLD AIRLINES, INC., Plaintiff-Appellee,

v.

HOWARD R. HUGHES, Defendant,

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

JUDGMENT—June 2, 1964

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the said District Court be and it hereby is found to have had jurisdiction of the action and that the orders of the Civil Aeronautics Board do not constitute a good defense to the antitrust claim of the plaintiff.

A. Daniel Fusaro, Clerk.

[fol. 27989a] [File endorsement omitted]

[fol. 27990]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28406

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Circuit Judges.

TRANS WORLD AIRLINES, INC., Plaintiff-Appellee,

v.

HOWARD R. HUGHES and RAYMOND M. HOLLIDAY,
Defendants,

HUGHES TOOL COMPANY, Defendant-Appellant,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF
THE UNITED STATES, et al.,

Additional Defendants-Appellees.

JUDGMENT—June 2, 1964

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with the exception of the said order dealing with the second counterclaim.

Further ordered, adjudged and decreed that the second counterclaim be and it hereby is dismissed for lack of jurisdiction.

A. Daniel Fusaro, Clerk.

[fol. 27990a] [File endorsement omitted]

[fol. 27991]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 151—September Term, 1963

Docket No. 28406

TRANS WORLD AIRLINES, INC., Plaintiff-Appellee,

v.

HOWARD R. HUGHES and RAYMOND M. HOLLIDAY,
Defendants,

and

HUGHES TOOL COMPANY, Defendant-Appellant,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO., INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR., Additional Defendants-Appellees,

and

ERNEST R. BREECH, Additional Defendant.

PETITION FOR REHEARING AND REQUEST FOR REHEARING IN BANC—Filed June 17, 1964

To the Honorable J. Edward Lumbard, Chief Judge, and Irving R. Kaufman and Paul R. Hays, Circuit Judges.

Defendant-Appellant Hughes Tool Company ("Toolco") respectfully presents this Petition, pursuant to Rule 25 [fol. 27992] of the Rules of this Court, for rehearing of so much of the Court's decision, rendered herein on June 2, 1964, as affirms the dismissal with prejudice of the First, Third, Fourth and Fifth Counterclaims asserted by Toolco.

The issues raised by the appeal, and more particularly by the Court's opinion thereon, involve important questions of substantive and procedural law which, it is suggested, should be reheard in banc. These issues include:

> (1) ***Whether the Court's affirmance of the dismissal with prejudice of counterclaims alleging the same conduct but seeking relief on different theories of liability is inconsistent with its decision that the Civil Aeronautics Board (the "CAB") has exclusive jurisdiction over the Second Counterclaim, which alleges that that conduct is in violation of Section 408 of the Federal Aviation Act of 1958 (the "Act").*** Included in this question is a consideration of (i) the relief available from the CAB and from the courts for a violation of the Act, (ii) the accommodation of the rule against splitting a cause of action to a claim involving one course of conduct but several theories of liability where an administrative agency, *e.g.*, the CAB, has exclusive jurisdiction over the conduct on one theory of liability, and (iii) the accommodation of the jurisdiction of the federal courts under the antitrust laws to the jurisdiction of an administrative agency, *e.g.*, the CAB, where Congress has granted to the agency the power to immunize conduct within the agency's regulatory authority from the antitrust laws.

Since the limited interlocutory appeal by Toolco from the decision of the District Court as to its jurisdiction over the causes of action alleged in the complaint (Appeal No. 28405)* also involves the proper accommodation of the [fol. 27993] jurisdiction of the federal courts under the antitrust laws to that of the CAB under the Act, Toolco suggests that if the Court grants rehearing in banc as to this appeal, it should also consider granting rehearing in banc in Appeal No. 28405.

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* That appeal on the complaint was limited to the questions of "(1) Whether the U.S. District Court for the Southern District of New York had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the anti-trust claim of [TWA]. . . ." Order of June 6, 1963 (A-138 of Toolco's Appendix in Appeal No. 28405)

(2) *Whether, under Rule 41,*[*] *a dismissal with prejudice of a derivative claim prior to a hearing on the merits and by reason of the imposition of sanctions under Rule 37 against the person asserting the derivative claim is a determination "on the merits" so as to bar a subsequent suit by the corporation or by another stockholder on behalf of the corporation.* There does not appear to be any decision in this Circuit or elsewhere determining this question.

(3) *Whether Rule 23(c) is not to be interpreted as requiring the giving of notice to other stockholders before a dismissal with prejudice where there has been no hearing on the merits.* With respect to this question also, there appears to be no controlling decision.

(4) *Whether a dismissal with prejudice of the counterclaims*[**] *other than the Second was justified by the record herein, particularly since (i) the record does not support the Court's findings of prejudice to the additional defendants, and (ii) the sanction of a* [fol. 27994] *dismissal with prejudice of said counterclaims appears to have been imposed by reason of conduct relating to the complaint and thus to have been punitive and a denial of due process of law.* The holding of the Court on this appeal appears to be in conflict with that of the Court of Appeals for the District of Columbia in *Von der Heydt* v. *Rogers,* 251 F.2d 17 (D.C. Cir. 1958). There the Court held that it was improper for a District Court to order a dismissal with prejudice under Rule 37 without first conducting a hearing to determine what evidence the one seeking the dismissal had been precluded from obtaining by the refusal to make discovery.

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[*] All references to "Rule" are to the Federal Rules of Civil Procedure.

[**] As used herein, "the counterclaims" refers to all of Toolco's counterclaims other than the Sixth Counterclaim".

(5) *Whether a District Court may fail to grant relief, even though the moving party is entitled to it, because the relief has not been specifically requested.* In light of the frequency in motion papers of requests for "other and further relief", the effect of a holding that a District Court may fail to grant relief to which a party is entitled on the ground that it has not been specifically requested is of wide importance to the profession generally.

POINT I

The Affirmance of the Dismissal With Prejudice of the First, Third, Fourth and Fifth Counterclaims Is Inconsistent With the Court's Decision That the Civil Aeronautics Board Has Exclusive Jurisdiction Over the Second Counterclaim.

Toolco respectfully suggests that rehearing in banc is required to resolve the conflict in the Court's opinion between the dismissal with prejudice of the First, Third, Fourth and Fifth Counterclaims and its determination that the CAB has exclusive jurisdiction over the Second Counterclaim.

[fol. 27995] The counterclaims allege in detail a course of conduct by the additional defendants relating to their acquisition, maintenance and perpetuation of control over Trans World Airlines, Inc. ("TWA"). Toolco, for itself and on behalf of TWA, seeks relief by reason of this course of conduct on various theories of liability: (1) violations of federal statutes (the Act and the antitrust laws); (2) a violation of contractual rights; and (3) violations of other common-law rights and the law of Delaware.*

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* The First Counterclaim alleges an interference with contractual rights of Toolco by the additional defendants through a course of conduct designed to perpetuate the voting trust created with respect to Toolco's 78% stock interest in TWA (the "Voting Trust"); the Second alleges that the conduct of the additional defendants in acquiring and maintaining control over TWA violates Section 408 of the Act; the Third, asserted derivatively on behalf of TWA, and the Fourth, asserted by Toolco on its own behalf, allege that the conduct in acquiring, maintaining and perpetuating

It is well established in this Circuit as elsewhere that a person aggrieved by the result of a course of conduct pursued by another must seek in one action all relief to which he is entitled or be barred from recovering in a subsequent action any relief by reason of that conduct on a theory of liability not asserted in the first action. See, *e.g.*, *Macris* v. *Sociedad Maritima San Nicolas, S.A.*, 271 F.2d 956 (2d Cir. 1959), *cert. denied*, 362 U.S. 935 (1960); *cf.* Rule 13(a). Accordingly, Toolco was required to seek in the counterclaims asserted on its own behalf and on behalf of TWA all relief to which each was entitled by reason of the conduct alleged or be barred from bringing a subsequent action by reason of such conduct.

The decision of the Court recognizes that whether the conduct of which Toolco complains is or is not in violation of the Act is within the exclusive jurisdiction of the CAB. However, the rights of Toolco or TWA to relief by reason of a violation of Section 408 of the Act are not [fol. 27996] limited to relief that may be granted by the CAB. For example, the CAB has no power to award damages by reason of a violation of the Act. Since this Court has held that only the CAB may determine whether the Act has been violated, it is only after a finding by the CAB that the Act has been violated that a District Court may award damages or other relief on account of such violation. Therefore, neither Toolco nor TWA could obtain complete relief by reason of the conduct alleged in the counterclaims until after the CAB acted on Toolco's complaint to the CAB in which the same course of conduct is alleged.

A holding that conduct by the additional defendants in violation of the Act does not entitled TWA and Toolco to damages and other relief to be obtained after such a determination would be in conflict with the recent decision of the Supreme Court in *J. I. Case Co.* v. *Borak,* U.S.

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control was in violation of the antitrust laws; the Fifth alleges that the same course of conduct was in violation of Toolco's rights under the common law and the law of Delaware.

, 32 U.S.L. Week 4480 (June 8, 1964), and comparable decisions of this Court, including *Fitzgerald* v. *Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956).*

[fol. 27997] If, however, the decision herein is construed as not interfering with the relief which TWA and Toolco may be entitled to obtain upon a determination by the CAB that the conduct of the additional defendants is and ~~was in~~ violation of the Act, the affirmance of the dismissal with prejudice of the remaining counterclaims is in conflict with the holding of the Court as to the Second Counterclaim. The dismissal with prejudice would appear to preclude TWA and Toolco from asserting hereafter any claim for relief based upon the conduct alleged in the counterclaims other than the Second and, therefore, the judgment of the District Court dismissing with prejudice the First, Third, Fourth and Fifth Counterclaims, which this Court has affirmed, would appear to bar TWA and Toolco from obtaining relief on a claim over which this Court has held that the District Court had no jurisdiction.

Furthermore, if the decision of the Court is to be interpreted as barring a subsequent action for damages or other relief only with respect to conduct of the additional defendants other than conduct in violation of the Act, then the decision would be in conflict with the well-established rule that a claimant may maintain only one action by reason of a single course of conduct.

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* In *Case* the Supreme Court reaffirmed that a provision of a federal statute making conduct unlawful and designed for the protection of a particular class gives to the members of that class a right of action in the federal courts for damages or equitable relief even though the remedy is not specifically stated in the statute. This Court has applied a similar principle to the Civil Aeronautics Act of 1938, holding that because Section 622(a) of that Act made it a federal crime to violate, *inter alia,* Section 482(b) of that Act and that since that Section is for the benefit of persons, including passengers, using the facilities of air carriers, by implication "its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation." *Fitzgerald* v. *Pan American World Airways,* 229 F.2d 499, 501 (2d Cir. 1956). The present counterpart of Section 622(a) (49 U.S.C. §1472(a)) makes it a federal crime to violate, *inter alia,* Section 408 of the Act. And both the terms of Section 408 and the legislative history thereof make clear that said Section was designed to protect an air carrier and its stockholders against the consequences of an acquisition and maintenance of control in violation of the Act.

The decision of the Court also appears to be in conflict with decisions of the Supreme Court including *Far East Conference* v. *United States*, 342 U.S. 570 (1952), to the effect that when a statute grants to a regulatory agency the power to grant immunity from the operation of the antitrust laws (such as is given to the CAB under Section 414 of the Act), the courts should not exercise their jurisdiction over alleged violations of the antitrust laws until after the agency has had an opportunity to exercise its function in determining the possible existence of a public interest with respect to the regulated industry which overrides the public interest reflected by the antitrust laws. [fol. 27998] The decision of this Court is also in conflict with the decision of the Supreme Court handed down on January 14, 1963 in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) which held that the principle exemplified by *Far East Conference* v. *United States, supra,* was to be recognized and applied even though the conduct complained of was not within the exemptive provisions of the regulatory statute.

As heretofore pointed out, the counterclaims which were dismissed with prejudice assert that the additional defendants engaged in conduct which violated both the Act and the antitrust laws. The conduct alleged to be in violation of the antitrust laws involved, *inter alia,* conduct in acquiring and maintaining control over TWA by a person engaged in a phase of aeronautics. Under the Act the CAB could grant immunity from the antitrust laws with respect to such conduct even if it is assumed that CAB does not have jurisdiction to grant immunity with respect to other conduct alleged in the counterclaims. Accordingly, only after the CAB had been given an opportunity to exercise its functions under the Act could Toolco and TWA obtain complete and adequate relief by reason of the violations of the antitrust laws alleged in the counterclaims. This was the basis for the request by Toolco for a stay. The failure of this Court to recognize this principle was, it is submitted, error.

Even if it is assumed, *arguendo*, that the granting of a stay was discretionary and not mandatory, the unwillingness of Toolco to proceed before it was in a position to obtain complete and adequate relief would scarcely appear to justify the imposition of what this Court describes as "the most severe sanction which the court may apply" (Slip Opinion, p. 2187). Toolco's position before the District Court with respect to the counterclaims was an effort to protect its right to recover at one time all relief to [fol. 27999] which it was entitled by reason of the single course of conduct of the additional defendants alleged in the counterclaims.

POINT II

The Decision of the Court Should Be Modified or Clarified With Respect to the Dismissal With Prejudice of the Derivative Counterclaim.

The decision of this Court affirms, without qualification, the dismissal with prejudice of the Third Counterclaim, which is a derivative claim asserted on behalf of TWA. Assuming, *arguendo*, that a dismissal with prejudice of the remaining counterclaims could be justified on this record, if the effect of the dismissal with prejudice of the Third Counterclaim, is to bar TWA or other stockholders of TWA from maintaining an action based on the conduct alleged in the Third Counterclaim to have injured TWA, then the dismissal with prejudice amounts to an imposition of sanctions against *TWA and its minority stockholders.*

No notice of the proposed dismissal was given to the minority stockholders of TWA. The dismissal with prejudice of the Third Counterclaim without notice to other stockholders presents important and novel questions under the Federal Rules of Civil Procedure as to the consequences of a failure to comply with a discovery order by a stockholder asserting a derivative action and as to the procedure to be followed thereupon.

Although it is recognized that under Rule 23(c) notice to stockholders is not an essential condition precedent to a dismissal after a hearing on the merits, Toolco knows of no controlling decision that would dispense with such notice where, as here, no hearing on the merits has been [fol. 28000] held.* The importance of such notice arises from (i) the fact that the dismissal with prejudice may bar or present an impediment to a subsequent action by a minority shareholder and (ii) that all or part of the claim which was asserted in the original action may be barred by the statute of limitations at the time of the commencement of another action.

Whether or not a subsequent action by another stockholder would be barred by the dismissal with prejudice depends upon an interpretation of Rule 41(b) which provides in pertinent part that "Unless the court in its order for dismissal otherwise specifies, a dismissal . . . operates as an adjudication upon the merits." However, Toolco knows of no decision which determines whether a dismissal with prejudice as a result of the imposition of sanctions under Rule 37 in a derivative action would bar a subsequent action by another shareholder or by TWA. Moreover, in the action instituted by TWA against Toolco and Mr. Hughes in the Delaware Court of Chancery, in which the conduct here alleged as violations of the antitrust laws is there alleged to have been a breach of fiduciary duty and in which Toolco asserted ounterclaims embracing the same conduct as the counterclaims asserted herein, the additional defendants took the position that a dismissal with prejudice of a derivative counterclaim would not bar a subsequent action brought by another stockholder. Presumably the Court's decision was not intended to bar a subsequent action by TWA or another stockholder of TWA for injuries suffered by TWA. Accordingly, it is respectfully submitted that particularly in light of the provisions of Rule 41(b) clarification of the decision is required in this respect.

[fol. 28001] Since the derivative counterclaim is based in part upon conduct prior to 1960, any dismissal thereof without giving other interested parties an opportunity to prosecute the action would be prejudicial to the rights of TWA and its minority stockholders by reason of the statute of limitations. As a practical matter so long as Toolco was maintaining its derivative counterclaim, no minority stockholder of TWA was in a position to assert effectively a claim being asserted on behalf of TWA by its 78% stockholder against those in control of TWA. Moreover, minority stockholders had a right to expect that the pendency of the derivative claim asserted by Toolco would protect their interests. Accordingly, for the protection of TWA and its minority stockholders this Court should modify its decision and the judgment of the District Court so that a minority stockholder may continue to maintain the derivative claim on behalf of TWA.

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* A determination that notice to stockholders is not required in a dismissal with prejudice under Rule 37 would suggest that the protective features of Rule 23(c) could be avoided by the failure to comply with a discovery order.

POINT III

The Decision That Toolco's Conduct During Discovery Justified a Dismissal with Prejudice Is Based Upon a Misapprehension of the Record.

This Court affirmed the dismissal with prejudice of the counterclaims by reason of its finding that "Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year" (Slip Opinion, p. 2188) justified the imposition of the most severe sanction provided for in Rule 37. However, in reaching this conclusion the Court relied upon Toolco's conduct in discovery relating to the *complaint,* notwithstanding that, by reason of this Court's order limiting the issues on the interlocutory appeal relating to the complaint, Toolco was not free to present fully its arguments justifying its conduct. It is respectfully submitted (i) that the record does not [fol. 28002] support the findings made by this Court in support of a dismissal with prejudice under Rule 37 with respect to Toolco's conduct as it related to the counterclaims, and (ii) that the imposition of sanctions with respect to the counterclaims by reason of conduct relating to the complaint is a punitive measure and a denial of due process of law.

The record shows that:

(1) During the year in which discovery took place, Toolco did not subject the additional defendants to

any discovery. By order of the District Court, enforced by the Special Master, the discovery proceedings by Toolco were confined exclusively to matters raised by TWA's complaint and Toolco was precluded from conducting discovery with respect to the counterclaims and in fact conducted no discovery with respect to the counterclaims. Not one additional defendant was examined on deposition nor was any witness examined with respect to the issues raised by the counterclaims. The documents produced by the additional defendants were documents called for by subpoenas *duces tecum*, served upon them before the counterclaims had been filed, which related to the issues of the complaint and which the additional defendants would have been obliged to produce even if the counterclaims had never been filed. The attendance by the additional defendants at the deposition being conducted by Toolco of TWA on the issues of the complaint is not chargeable to Toolco. The additional defendants voluntarily chose to attend. Moreover, they did not cross-examine any of the persons deposed, but limited their participation in the proceedings to a series of procedural maneuvers. Since the subject matter of the examination was limited to the complaint, any burden the additional defendants in- [fol. 28003] curred by reason of attending was a burden gratuitously assumed.

(2) The Special Master expressly found, notwithstanding the length of time taken by Toolco in discovery, that Toolco had proceeded diligently and expeditiously in the conduct of discovery (A-166 of Toolco's Appendix in Appeal No. 28405). The District Court did not make any contrary finding.

(3) Until January 25, 1963 Toolco had an absolute right, under Rules 41(a)(1) and 41(c), to a dismissal *without* prejudice of the counterclaims as against all additional defendants since it was not until that date that answers to the counterclaims were filed by any additional defendant. Nothing occurred between January 25, 1963 and February 8, 1963 (the date Judge Metzner invited an application by the additional de-

fendants to dismiss with prejudice following Toolco's advice that Mr. Hughes would not appear for deposition), which in any way prejudiced or changed the position of the additional defendants so that they then became entitled to the imposition of sanctions against Toolco under Rule 37.

(4) Toolco may not be charged with securing successive adjournments of the Hughes deposition. The original return date of September 24, 1962 on the subpoena (obtained by TWA and not the additional defendants) accepted on behalf of Mr. Hughes, was inserted by TWA without authority of the District Court or Special Master and was in violation of prior court orders that so long as Toolco was proceeding expeditiously Toolco had the right before it was examined to conclude the depositions it had scheduled with respect to the issues of the complaint. By accepting the subpoena, Toolco did not waive either (a) the priority which it had obtained by prior decisions of the District Court or (b) its rights as a defendant [fol. 28004] to obtain a meaningful identification of the factual basis for the complaint prior to subjecting itself to examination.* Moreover, the suggestion that Toolco

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* Toolco believes it has such a right. However, by limiting the issues which it would review at this time on Toolco's appeal on the complaint (Appeal No. 28405), this Court precluded Toolco from presenting for review in that appeal the important and undetermined question whether a defendant is entitled to a meaningful identification of the factual claims of a plaintiff before he may be properly subjected to oral depositions by the plaintiff. Prior to accepting the subpoena, Toolco had stated on the record that if TWA were made to reveal the factual basis for the conclusory averments of the complaint, Toolco would then be in a position to secure a dismissal of the complaint on the merits.

When the District Court denied Toolco the opportunity to obtain an identification of the claims of TWA but ordered it to subject itself to the burden and expense (estimated to exceed $1 million) of discovery prior to any definition of TWA's factual claims, Toolco made a "business decision" not to submit to discovery at that time. This decision did not relate to the counterclaims as to which Toolco reached a legal conclusion that it could not effectively prosecute those counterclaims until after CAB action. Toolco's "business decision" is thus irrelevant to a consideration of the propriety of a dismissal with prejudice of the counterclaims.

unjustifiably secured the adjournment of the Hughes deposition to February 11, 1963 ignores the record which discloses that on October 25, 1962 when the Special Master fixed February 11, 1963 as the date for the Hughes deposition he did so in order to give Toolco an opportunity to ascertain the factual basis of TWA's complaint which, the Special Master found, TWA had up to that time not revealed. The Special Master stated on the record that between October 25 and February 11 he expected (i) that Toolco would undertake further deposition discovery, (ii) that the Rule 16 proceedings recommended by him would in fact have taken place, (iii) that TWA would have furnished answers to interrogatories served by Toolco, and that Toolco would then be in a position to bring on for hearing a dispositive motion addressed to the [fol. 28005] complaint. Accordingly, if the rulings of the Special Master had been adhered to, by February 11 Toolco would have been apprised of the factual basis of TWA's complaint and in the event that Toolco's motion to dismiss was denied, it would not then have been improper for TWA to examine Toolco through Mr. Hughes. However, TWA appealed the rulings of the Special Master to Judge Metzner and the disposition of that appeal did not come until January 10, 1963, when Judge Metzner in effect reversed the Special Master. Accordingly, Toolco was deprived of the discovery opportunities the Special Master had recommended be afforded to it *before* Toolco was to be required to produce Mr. Hughes, yet the Hughes deposition date was not changed.

(5) The additional defendants were not free to schedule deposition proceedings of their own until *after* TWA had completed its discovery. Accordingly, insofar as the deposition of Mr. Hughes was concerned, the only right of the additional defendants was to participate in any examination conducted by TWA. The fact that Toolco chose to rest on the merits of its positions in order to obtain appellate review of, *inter alia*, orders relating to discovery on

the complaint,* a review which Toolco has not yet obtained, did not give any rights to the additional defendants to the oral examination of Hughes or deprive the additional defendants of any rights which they had. If TWA did not conduct any examination then there was nothing in which the additional defendants could participate and they were deprived of no rights by not being able to examine Mr. Hughes at [fol. 28006] that time. That TWA may have had a right to require Mr. Hughes to appear and that it might be entitled to relief under Rule 37 for his nonappearance may not enlarge the rights of the additional defendants.

(6) Toolco, not Mr. Hughes, asserted the counterclaims; that Mr. Hughes is Toolco's sole stockholder does not establish that Mr. Hughes possesses any facts relating to the counterclaims, yet no hearing was held and no facts, other than that of his stock ownership, appear in the record to support the conclusion that Mr. Hughes' examination was so "essential" to the conduct of the defense on the counterclaims that his non-availability on deposition should lead to a dismissal of the entire case with prejudice. In failing to require such a hearing this Court appears to be adopting an interpretation of the Federal Rules in conflict with that of the Court of Appeals for the District of Columbia in *Von der Heydt* v. *Rogers,* 251 F.2d 17 (D.C. Cir. 1958), discussed at pages 44-45 of Toolco's main brief. It is respectfully submitted that this Court should clarify its opinion as to whether it is intended to establish a rule in this Circuit which differs from that which prevails elsewhere.

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* In particular, Toolco sought review of the order of Judge Metzner reversing prior decisions of the District Court which, in apparent recognition of the right of a defendant to obtain a meaningful identification of the plaintiff's factual claim, had granted Toolco priority of discovery.

POINT IV

The Decision That Toolco Was Not Entitled to a Voluntary Non-suit Under Rules 41(a) and 41(c) Is Also Based Upon a Misapprehension of the Record.

The Court disposes of Toolco's contention that Toolco was entitled to a dismissal without prejudice by stating that Toolco did not request such a dismissal.

Toolco's position on the counterclaims was that Toolco was entitled to suspend prosecution thereof as a matter [fol. 28007] of law so as to obtain a CAB determination which Toolco believed was a condition precedent to obtaining complete relief in the District Court. Prosecution of the action could be suspended in one of two ways: (a) by a stay, or (b) by a dismissal without prejudice. Since a stay would be more convenient procedurally than a dismissal, and since a stay would avoid a possible statute of limitations problem, Toolco requested a stay. While Toolco did not make application for a voluntary non-suit under Rules 41(a) and 41(c) *in haec verba,* it did request the District Court to grant such other and further relief as may be just and proper. All parties understood that Toolco's intention was to suspend further proceedings on the counterclaims and no one could have been prejudiced by Toolco's failure to specifically request a dismissal without prejudice. Accordingly, if the District Court were disinclined to grant the stay, then it should have considered and decided whether Toolco was entitled to a suspension of prosecution by way of a voluntary non-suit, particularly since Toolco had the absolute right to a voluntary non-suit as against all parties on the counterclaims up until January 25, 1963.

Wherefore, it is respectfully requested that this Court grant to the petitioner rehearing in banc.

Chester C. Davis, Attorney for Petitioner, Hughes Tool Company, Office & P.O. Address, 120 Broadway, New York 5, New York.

Dated: June 17, 1964.

[fol. 28008]

Certificate of Counsel

Chester C. Davis, attorney for the above-named petitioner, does hereby certify that the foregoing petition for rehearing and request for rehearing in banc is presented in good faith and not for delay.

Chester C. Davis, Attorney for Petitioner.

Dated: June 17, 1964.

[fol. 28009]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—July 6, 1964

Chester C. Davis, New York, N. Y., for Hughes Tool Company.

Motion denied.

J. E. L., I. R. K., P. R. H., U.S.C.JJ.

[fol. 28009a] [File endorsement omitted]

[fol. 28010]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—July 6, 1964

A petition for a rehearing having been filed herein by counsel for the appellant Hughes Tool Co.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 28010a] [File endorsement omitted]

[fol. 28011]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC— July 6, 1964

Chester C. Davis, New York, N. Y., for Hughes Tool Company.

No active circuit judge having requested that the case be reheard in banc, Judge Friendly not participating in the consideration of the petition, the petition is denied.

J. Edward Lumbard, Chief Judge.

[fol. 28011a] [File endorsement omitted]

[fol. 28012]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC— July 6, 1964

A petition for a rehearing in banc having been filed herein by counsel for the appellant Hughes Tool Company,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 28012a] [File endorsement omitted]

[fol. 28013] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 28014]

SUPREME COURT OF THE UNITED STATES

No. 443—October Term, 1964

HUGHES TOOL COMPANY, et al., Petitioners,

v.

TRANS WORLD AIRLINES, INC.

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 28015]

SUPREME COURT OF THE UNITED STATES

No. 501—October Term, 1964

HUGHES TOOL COMPANY, Petitioner,

v.

TRANS WORLD AIRLINES, INC., et al.

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.